



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





THE
AMERICAN REPORTS:

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

VOL. XII.

CONTAINING ALL CASES OF ANY GENERAL IMPORTANCE IN THE FOLLOWING
REPORTS:

20 CONNECTICUT; 45 GEORGIA; 46 GEORGIA; 22 GRATTAN (VA.)
7 KANSAS; 8 KANSAS; 9 KANSAS; 109 MASSACHUSETTS;
26 MICHIGAN; 26 MICHIGAN; 46 MISSISSIPPI; 47 MISSIS-
SIPPI; 48 MISSISSIPPI; 51 NEW HAMPSHIRE; 67
NORTH CAROLINA; 68 NORTH CAROLINA;
69 NORTH CAROLINA; 45 VERMONT.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1874.

JUL 29 1942

121652

Entered, according to act of Congress, in the year eighteen hundred and seventy-four,

By JOHN D. PARSONS, Jr.,

In the office of the Librarian of Congress, at Washington.

**WHEE, PARSONS AND COMPANY,
PRINTERS AND STEREOTYPERS,
ALBANY, N. Y.**

SCHEDULE

OF STATE REPORTS FROM WHICH CASES HAVE BEEN SELECTED FOR THE AMERICAN REPORTS.

The volumes of State Reports are in parentheses, and the volumes of American Reports in heavy letter.

Alabama (44) 4; (45) 6; (46) 7; (47) 11.
Arkansas (25) 4; (26) 7; (27) 11.
Bush. (Ky.) (7) 8; (8) 8.
California (39) 2; (40) 6; (41, 42) 10.
Colorado (1) 9.
Connecticut (36) 4; (37, 38) 9; (39) 12.
Florida (13) 7.
Georgia (40) 2; (41, 42) 5; (43, 44) 9; (45, 46) 12.
Grattan (Va.) (20) 3; (21) 8; (22) 12.
Heiskell (Tenn.) (1) 2; (2) 5; (3) 8.
Houston (Del.) (3) 11.
Illinois (51) 2; (52) 4; (53, 54) 5; (55, 56) 8; (57, 58) 11.
Indiana (32) 2; (33) 5; (34) 7; (35) 9; (36, 37, 38) 10.
Iowa (27) 1; (28, 29) 4; (30) 6; (31, 32) 7; (33, 34) 11.
Kansas (5, 6) 7; (7, 8, 9) 12.
Louisiana (22) 2; (23) 8.
Maine (57) 2; (58) 4; (59) 8; (60) 11.
Maryland (31) 1; (32, 33) 3; (34, 35) 6; (36, 37) 11.
Massachusetts (100) 1; (101, 102) 3; (103) 4; (104) 6; (105) 7; (106) 8
(107) 9; (108) 11; (109) 12.
Michigan (19) 2; (20, 21) 4; (22) 7; (23, 24) 9; (25, 26) 12.
Minnesota (15) 2; (16, 17, 18) 10.
Mississippi (42) 2; (43) 5; (44, 45) 7; (46, 47, 48) 12.
Missouri (46) 2; (47) 4; (48, 49) 8; (50, 51) 11.
Nevada (6) 3; (7) 8.
New Hampshire (48) 2; (49) 6; (50) 9; (51) 12.
New Jersey (34) 3; (35) 10.
New York (41, 42) 1; (43) 3; (44) 4; (45) 6; (46, 47) 7; (48) 8; (49, 50
51) 10; (52) 11.
North Carolina (65) 6; (66) 8; (67, 68, 69) 12.
Ohio (19) 2; (20) 5; (21) 8; (22) 10.
Oregon (3) 8.
Pennsylvania (62) 1; (63, 64, 65) 3; (66, 67) 5; (68, 69) 8; (70, 71) 10.
Rhode Island (8) 5, (9) 11.
South Carolina (1 N. S.) 7.
Texas (32) 5; (33, 34) 7.
Vermont (42) 1; (43) 5; (44) 8; (45) 12.
West Virginia (4) 6.
Wisconsin (24) 1; (25) 3; (26) 7; (27, 28, 29) 9; (30, 31) 11.

LIST OF JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

CONNECTICUT.

THOMAS BELDEN BUTLER, Chief Justice
JOHN DUANE PARK,
ELISHA CARPENTER,
LAFAYETTE SABINE FOSTER,
ORIGEN STORES SEYMOUR.

GEORGIA.

HIRAM WARNER, Chief Justice.
H. K. McCAY,
W. W. MONTGOMERY.

KANSAS.

SAMUEL A. KINGMAN, Chief Justice.
D. M. VALENTINE,
D. J. BREWER.

MASSACHUSETTS.

REUBEN A. CHAPMAN, Chief Justice.
HORACE GRAY, Jr.,
JOHN WELLS,
JAMES D. COLT,
SETH AMES,
MARCUS MORTON.

MICHIGAN.

ISAAC P. CHRISTIANOY, Chief Justice.
BENJAMIN F. GRAVES,
THOMAS M. COOLEY,
JAMES V. CAMPBELL.

LIST OF JUDGES.

MISSISSIPPI.

EPHRAIM G. PEYTON, *Chief Justice*,
 HORATIO F. SIMRALL,
 JONATHAN TARBELL

NEW HAMPSHIRE.

HENRY ADAMS BELLOWS, *Chief Justice*,
 JONATHAN EVERETT SARGENT,
 CHARLES DOE,
 JEREMIAH SMITH,
 WILLIAM LAWRENCE FOSTER,
 WILLIAM SPENCER LADD.

NORTH CAROLINA.

RICHMOND M. PEARSON, *Chief Justice*,
 EDWIN G. READE,
 WILLIAM B. RODMAN,
 ROBERT P. DICK,*
 THOMAS SETTLE,†
 NATHANIEL BOYDEN.

VERMONT.

JOHN PIERPOINT, *Chief Judge*,
 JAMES BARRETT,
 ASAHIEL PECK,
 HOYT H. WHEELER,
 HOMER E. ROYCE,
 TIMOTHY P. REDFIELD,
 JONATHAN ROSS.

VIRGINIA.

RICHARD C. L. MONCURE, *President*,
 JOSEPH CHRISTIAN,
 FRANCIS T. ANDERSON,
 WALLER R. STAPLES,
 WOOD BOULDIN.

* Resigned.

† Appointed *vice* Dick.

TABLE OF CASES REPORTED.

PAGE.	PAGE.
Adams v. Adams..... 134	Commonwealth v. Killian..... 714
Adams v. Reeves..... 637	Commonwealth v. Lockwood..... 608
Alken v. Boston, Concord & Montreal R. R..... 147	Cook v. Pridgen..... 563
Annable, Russell v..... 665	Cronly v. Hall..... 597
Atlanta, Mayor of, Forsyth v..... 576	Curry, Taylor v..... 661
Atwood v. Holcomb..... 386	
Ayer v. City of Norwich..... 396	Davis, Boylston Ins. Co. v..... 624
	Dawell, People v..... 260
Bank of Louisiana v. Williams..... 319	Daylight Burner Co. v. Odlin..... 45
Batchelder v. Keniston..... 143	Dearborn, Campbell v..... 671
Bedwell, Sublett v..... 388	Deering v. Boyle..... 480
Beery v. Irick..... 539	Dewey v. McLain..... 418
Bennett v. Goldthwait..... 742	Don Moran v. People..... 283
Blakely v. Patrick..... 600	Donnell v. State..... 375
Blackledge, Jones v..... 503	Dutton, Sweet v..... 744
Bledsoe v. Nixon..... 642	Dyer, Pierce v..... 716
Blount v. Windley..... 616	
Board of Registration, People ex rel. Hedgman v..... 297	Earl v. Tupper..... 199
Bond v. Wilson..... 466	Eaton v. Boston, Concord & Montreal R. R..... 147
Boston, Concord & Montreal R. R., Alken v..... 147	Eldredge, Heard v..... 687
Boston, Concord & Montreal R. R., Eaton v..... 147	Emery v. Huntington..... 726
Boothby v. Plalsted..... 140	Evans, Holmes v..... 372
Boyle, Deering v..... 480	Exum, Cogdell v..... 657
Boylston Ins. Co. v. Davis..... 624	
Branch, State v..... 633	Farley v. Lincoln..... 123
Bruce v. Luke..... 481	Fetal v. Middlesex R. R. Co..... 720
Buell v. Flowers..... 414	Finley, Miller v..... 306
Burroughs v. North Carolina R. R. Co. 611	Fitchburg R. R. Co., Metallic Compress- ion Casting Co. v..... 636
Burt v. Loyd..... 574	Flint and Fentonville Plank-road Co. v. Woodhull..... 233
Bush, Scott v..... 311	Flowers, Buell v..... 414
Bushong, Newton v..... 568	Forsyth v. Mayor of Atlanta..... 576
Butler, Porterfield v..... 329	Frisbie, Voorhies v..... 261
Butler v. Roys..... 318	
	Garrett v. Cheshire..... 647
Campbell v. Dearborn..... 671	Gaskill, Whitehurst v..... 655
Campbell, Stockwell v..... 398	Georgia Nat. Bank v. Henderson..... 580
Cardinal v. Smith..... 633	Georgia Railroad and Banking Co. v. McCurdy..... 577
Cheshire, Garrett v..... 647	Germania Ins. Co., Hollingsworth v... 579
City of Norwich, Ayer v..... 396	Goldthwait, Bennett v..... 742
Clark v. Wells..... 187	Gray v. Jackson..... 1
Cocheco National Bank v. Haskell... 67	Griswold v. Sabin..... 76
Cogdell v. Exum..... 657	
Cole, Horn v..... 111	Hall, Cronly v..... 597
Commissioners of Leavenworth Co. v. Miller..... 495	Hammond v. Hussey..... 41
	Harmon, Scott v..... 665

	PAGE.		PAGE.
Harrison, New Orleans, Jackson and		Middlesex R. R. Co., Feltal v.....	720
Great Northern R. R. Co. v.....	356	Miller v. Finley	306
Haskell, Cochecho Nat. Bank v.....	87	Miller, Com. of Leavenworth Co. v.....	426
Heard v. Eldredge	687	Moran v. People.....	283
Hedgman, People ex rel. v. Board of		Moore v. State.....	367
Registration.....	297	Murphy, Lee v.....	568
Henderlite v. Thurman.....	526	Muzzy, Johnson v.....	314
Her lerson, Georgia Nat. Bank v.....	590		
Hill, Smith v.....	189	New Orleans, Jack. & St. Northern R.	
Hoadley v. Watson.....	197	R. Co. v. Harrison.....	266
Holcomb, Atwood v.....	366	Newton v. Bushong.....	555
Hollingsworth v. Germania Ins. Co.....	579	Nichols, Kansas Pacific Railway Co. v.....	494
Holly, Hoyt v.....	390	Nichols, Union Pacific Railway Co. v.....	475
Holmes v. Evans.....	372	Nixon, Bledsoe v.....	642
Homestead Cases.....	507	North Carolina R. R. Co., Burroughs v.....	611
Horn v. Cole.....	111	Norwich, Ayer v.....	396
Hotchkiss, Welch v.....	363		
Hoyt v. Holly	390	Odlin, Daylight Burner Co. v.....	45
Huntington, Emery v.....	725	Osgood, Jordan v.....	731
Hussey, Hammond v.....	41		
		Palmer v. Preston.....	191
Inhabitants of Watertown v. Mayo....	604	Parker, Meriden Britannia Co. v....	401
Irick, Beery v.....	539	Patterson, State v.....	300
		Patrick, Blakely v.....	600
Jackson, Gray v.....	1	Pierce v. Dyer	716
Jeffries, Lawson v.....	342	Plaisted, Boothby v.....	140
Jenness v. Wendell	48	People v. Dawell.....	280
Johnson v. Muzzy... ..	214	People, Don Moran v.....	283
Jones v. Blackledge	503	People ex rel. Hedgman v. Board of	
Jordan v. Osgood	731	Registration.....	297
		People, Merwin v.....	314
Kansas Pacific Railway Co. v. Nichols,	494	People, Snyder v.....	308
Kansas Pacific Railway Co. v. Reynolds	500	People v. Moran.....	283
Keniston, Batschelder v.....	143	Pepper, State v.....	637
Killian, Commonwealth v.....	714	Perkins, L. S. & M. S. R. R. Co. v.....	275
		Peterson, Seguin v.....	194
L. S. & M. S. R. R. Co. v. Perkins	275	Porterfield v. Butler	329
Lathrop, Young v.....	603	Prell v. McDonald	422
Lawson v. Jeffries.....	342	Prescott v. Locke	52
Leavenworth Co., Com. of, v. Miller ..	426	Preston, Palmer v.....	191
Lee v. Murphy.....	563	Pridgen, Cook y.	563
Leonard v. Putnam	106	Putnam, Leonard v.....	106
Lincoln, Farley v.....	182		
Linkhaw, State v.....	645	Rand, State v.....	137
Locke, Prescott v.....	55	Reeves, Adams v.....	637
Lockwood, Commonwealth v.....	609	Roberts, Zuchtman v.....	663
Loyd, Burta v.....	574	Roya, Butler v.....	313
Luke, Bruce v.....	491	Rushing, State v.....	641
		Russell v. Annable.....	665
Mayo, Inhabitants of Watertown v....	604		
Mayor of Atlanta, Forsyth v.....	576	Sabin, Griswold v.....	76
McCord, State v.....	469	Scott v. Bush	311
McCurdy, Georgia R. R. & B'king Co. v.	577	Scott v. Harmon.....	686
McDonald, Prell v.....	423	Scribner, Worthington v.....	736
McLain, Dewey v.....	413	Seguin v. Peterson.....	194
Meriden Britannia Co. v. Parker	401	Smith, Cardinal v.....	683
Merwin v. People	314	Smith v. Hill.....	189
Metallic Compression Casting Co. v.		Snyder v. People.....	309
Fitchburg R. R. Co.....	639		

TABLE OF CASES REPORTED.

11

	PAGE.		PAGE.
Southern & Atlantic Telegraph Co.,		Thurman, Henderlite v.....	536
Southwestern R. R. Co. v.....	535	Tupper, Earl v.....	199
Southwestern R. R. Co. v. Southern &		Union Pacific Railway Co. v. Nichols..	475
Atlantic Telegraph Co.....	535	Voorhies v. Frisbie ...	391
State, Donnell v.	375	Warden, Sterling v.....	80
State, Moore v.....	397	Waters, Thompson v.....	343
State v. Branch.....	623	Watertown, Inhabitants of, Mayo v....	694
State v. Linkhaw.....	645	Watson, Hoadley v.....	197
State v. McCord.....	469	Weich v. Hotchkiss.....	338
State v. Patterson.....	300	Wells, Clark v.....	137
State v. Pepper.....	637	Wendell, Jenness v....	43
State v. Rand.....	127	Whitehurst v. Gaskill.....	655
State v. Rushing.....	641	Williams, Bank of Louisiana v.....	319
State of Georgia and the County of		Wilson, Bond v.....	423
Lee, Stokes v.....	533	Windley, Blount v.	616
Sterling v. Warden.....	80	Woodhull, Flint and Fentonville Plank-	
Stockwell v. Campbell.....	399	road Co v.	333
Stokes v. State of Georgia and the		Worthington v. Scribner.....	736
County of Lee.....	533	Young v. Lathrop.....	603
Sublett v. Bedwell.....	333	Zuchtman v. Roberts.....	693
Sweet v. Dutton.....	744		
Taylor v. Curry.....	631		
Thompson v. Waters.....	343		

TABLE OF CASES CITED.

	PAGE.		PAGE.
Abbott v. Draper.....	313	Baltimore v. State.....	334
Adams v. Bean.....	669	Banchoe v. Warren.....	41
Adams v. Briggs Iron Co.....	222	Bangor v. Lanail.....	177
Adams Co. v. Brown.....	124	Bank of Charlotte v. Hart.....	617, 623
Adams v. Couillard.....	736	Bank of Metropolis v. Jones.....	73
Adams v. Field.....	550	Bank of Old Dominion v. McVeigh.....	515
Adams v. Goodnow.....	133	Bank v. Rogers.....	73
Agan v. Fairfax.....	225	Bank of Brighton v. Smith.....	670
Akerly v. Vilas.....	542, 552	Bank of Rome v. Village of Rome, 439, 444	
Alexander's Cotton.....	509	Bank v. Wheeler.....	72
Alexander v. Milwaukee.....	163, 171	Barclay R. R. & Coal Co. v. Ingham.....	185
Aldans v. Cornwell.....	308	Barber v. Root.....	271
Allen v. Hawks.....	687	Barber v. Wheeler.....	40
Allen v. Maclellan.....	137	Barclay v. Tracy.....	52
Alna v. Plummer.....	79	Barclay v. Wainwright.....	615
American Ex. Bank v. Blanchard.....	663	Bard v. Poole.....	249
American Ex. Co. v. Second Nat. Bank.....	40	Baring v. Nash.....	224
Arney v. Allegheny Co.....	439	Bank of Augusta v. Earle.....	249
Anderson v. Dunn.....	236	Barker v. Parker.....	663
Anderson v. Gregg.....	328	Barker v. Valentine.....	663
Anderson v. Roberts.....	607	Barnard v. Adams.....	729
Andrews, ex parte.....	551	Barnard v. Poor.....	63
Andrews v. Lyons.....	116, 119, 130	Barnett v. The State.....	105
Angle v. M. & M. R. R. Co.....	33	Barney v. Clark.....	71
Anson v. Towgood.....	614	Barnhart v. Greenshields.....	679
Antelope, The.....	233	Barter v. Wheeler.....	39
Anthony v. Naneys.....	87	Bartholomew Co. v. Bright.....	439
Argent v. Durrant.....	94	Bartholomew v. Ireland.....	95
Arnold v. Hudson River R. R. Co.....	106	Barron v. Mayor of Baltimore, 158, 165, 171	
Arundell v. White.....	684	Barnes v. Hedley.....	331, 332, 335
Asphitel v. Bryan.....	116	Barrett v. Goddard.....	63
Asplen v. Nixon.....	110	Barret v. Warren.....	183
Atchison v. Bartholow.....	434	Bartlett v. Harlan.....	221, 229
Atchison v. Butcher.....	441, 442, 444	Bartlett v. Pickersgill.....	675
Atkinson v. Newcastle and Gateshead Water-works Co.....	693	Bassett v. Salisbury Manuf. Co. 169, 170, 172	
Atter v. Backhouse.....	631	Bates v. Smith.....	176
Attorney-General v. Briant.....	738	Bancum v. Smith.....	599
Attorney-General v. Germantown Road.....	164	Bean v. Parker.....	667
Audenried v. Betteley.....	120, 665	Bean v. Smith.....	607, 608
Augusta Bank v. Augusta.....	440	Beardsley v. Torrey.....	548
Aurora v. West.....	439	Beatson v. Skene.....	739
Austin v. Murray.....	165, 698	Beecher v. Parmele.....	36, 98
Aycock v. Martin.....	347	Beekman v. Saratoga, etc., R. R. Co.....	452
Ayer v. Tilton.....	70	Bell v. Keller.....	479
		Bellinger v. N. Y. Cent. R. R.....	165
		Bellows v. Stone.....	135
B. & P. S. Co. v. Brown.....	32	Bemis v. Becker.....	442
Babcock v. Western R. R.....	167	Benbow v. Iowa City.....	443
Bacheider v. Sanborn.....	86	Bender v. Nashua.....	178, 179
Backman v. Charlestown.....	47	Benedict v. Golt.....	179
Bacon v. Bevan.....	328	Bentley v. Phelps.....	677, 682
Bacon v. Towne.....	683	Bennett v. Brooks.....	724
Bacon v. Waters.....	683, 684	Bennett v. Flynn.....	38
Baker v. Briggs.....	70	Benson v. Mayor of Albany.....	430, 443
Baker v. Andrews' Heirs.....	111	Benson v. Remington.....	198
Baker v. Boston.....	697, 698	Berry v. Bland.....	328
Baker v. Gee.....	462	Berry v. Irichl.....	549
Baker v. Gregory.....	484	Beery v. Irick.....	541
Baker v. Wind.....	679	Bicknell v. Dorion.....	684
Baldley v. Parker.....	52, 54	Bigelow v. Randolph.....	170
Baldwin v. Hale.....	489	Bissell v. City of Jefferson.....	439
Baldwin v. Whiting.....	221	Bissell v. Horton.....	548
Ball v. Commonwealth.....	573	Bixby v. Course.....	551
Ball v. Winchester.....	178	Blades v. Niggs.....	95, 98, 100
Ballin v. Dillaye.....	483	Blair v. Williams.....	481
Balt. & Potomac R. R. v. Magruder.....	167	Blake v. Pilford.....	741
Baltimore & Sus. R. R. Co. v. Nesbit.....	348	Blake v. Rich.....	156

TABLE OF CASES CITED.

	PAGE.		PAGE.
Blake v. White.....	62	C. W. & Z. R. R. Co. v. Commissioners	438
Blanchard v. Russell.....	487	Clinton county.....	438
Blanchet v. Foster.....	113	Cadaval v. Collins.....	631
Blevins v. Baker.....	628	Cady v. Shepherd.....	667, 668
Block v. Cross.....	328	Caldwell v. Justices of Burke.....	439, 443
Blodgett v. Hildreth.....	674	Callender v. Marsh.....	176
Blood v. Nashua & Lowell R. R.....	167	Campau v. Godfrey.....	212
Bloodgood v. Mohawk & Hudson R. R. Co.....	158, 165, 169, 452	Campbell v. State.....	470
Blodget v. State.....	318	Canal Commissioners v. People.....	156, 165
Blossom v. Brightman.....	221		166
Bogardus v. Trinity Church.....	550	Canal Co. v. Hathaway.....	124
Boody v. The United States.....	89	Candee v. P. R. R. Co.....	38
Bonner, ex parte.....	222	Carman v. Steubenville & Ind. R. R. Co.....	164
Borden v. Fitch.....	138, 272	Carey v. Rawson.....	678
Borier v. Wheeler.....	21, 23	Carlisle v. Greenwood.....	108
Booth v. Town of Woodbury.....	161, 449	Carpenter v. Stillwell.....	122
Boston & Roxbury Mill Corp. v. Gardner.....	164	Carpue v. London & Brighton Railway Co.....	725
Boston & Roxbury Mill Corp. v. Newman.....	165	Carroll v. Norwood.....	223
Boston F. Co. v. Condit.....	222	Carroll v. State.....	214
Boston & Worcester R. R. Co. v. Dana.....	738	Carr v. Commercial Bank of Racine.....	468
Boston & Worcester R. R. v. Old Colony R. R.....	167	Carr v. Lancashire & York Railway Co.....	501
Bostwick v. Champion.....	27	Carr v. Northern Liberties.....	177
Bowen v. Kendall.....	575	Carroll v. State.....	210
Boyce v. Anderson.....	502	Carsen v. McPhetridge.....	342
Boyle v. Zachrie.....	489	Carson v. Western R. R.....	172
Brace v. Foulkes.....	230	Carter v. Peck.....	32
Brackett v. Crooks.....	54	Cary v. Curtis.....	547
Brainerd v. Brainerd.....	675	Cary v. C. & T. R. R. Co.....	30
Bradford v. S. C. R. R. Co.....	32	Case v. Douglas.....	551
Brand v. H. & C. Rail'ry Co. 158, 161, 163.....	662	Cash v. Whitworth.....	161
Brennan v. People.....	470	Cason v. Cheely.....	57
Bradstreet v. Neptune Ins. Co.....	136	Cass v. Dillon.....	433, 438
Bradshaw v. Omaha.....	235	Cathcart v. Robinson.....	560
Breithaupt v. Bank.....	546	Catlin v. Simpson.....	308
Brett v. Cumberland.....	216	Caulkins v. Mathews.....	164
Bridgeport v. Housatonic R. R. Co.....	438	Caze v. Reilly.....	726
Brigham v. Edmands.....	164, 189	Chamberlain v. Burlington.....	443
Briggs v. Rafferty.....	736	Chamberlain v. Crane.....	135, 136
Brodhead v. City of Milwaukee.....	449	Chamberlain v. Dow.....	313
Brothby v. Androsoggin & Ken. Railroad.....	167	Chatfield v. Wilson.....	173
Brown v. Cram.....	96, 100	Choteaux v. Leech.....	81
Brown v. Cayuga & Susq. R. R. Co.....	150	Cheeseborough v. Green.....	719
Brown v. Dewey.....	681	Cheever v. Wilson.....	271, 272
Brown v. Manter.....	90	Chilson v. Phillips.....	196
Brown, Matter of.....	562	Chillis v. Stearns.....	90, 96, 100, 108
Brownell v. Winnie.....	308	Chase v. Chase.....	271
Bronson v. Kinzie.....	497, 498, 517, 519, 658	Christmas v. Mitchell.....	659
Browning v. Morris.....	190	Christy, Ex parte.....	238
Brownsword v. Edwards.....	187	Cincinnati, etc. R. R. Co. v. Pearce.....	248
Bryan v. Reynolds.....	506	Cincinnati, W. & Z. R. v. Comm'rs of Clinton Co.....	438
Bryant v. Rich.....	551, 552	Cincinnati, etc. R. R. Co. v. Pontius.....	40
Bryant v. Scott.....	116	City of Aurora v. West.....	438, 468
Buckingham v. Hanna.....	122	City Bank v. Perkins.....	72
Buchanan v. Moore.....	100	City of Columbus v. Hydraulic W. M. Co.....	105
Buffalo B. B. & C. R. R. Co. v. Ferris.....	180	City of Leavenworth v. Mills.....	465
Buffalo City Bank v. Codd.....	95	City of St. Louis v. Alexander.....	429
Burling v. Reid.....	490	Claffin v. Farmers' Bank.....	228
Burgarden v. Circuit Court.....	490	Clarendon v. Hornby.....	228
Bunn v. Gorges.....	159	Clapp v. Cedar Co.....	438, 439
Bunn v. The People.....	218	Clark's Adm'x v. Hannibal and St. Joseph R. R.....	167
Burnett v. Lynch.....	238	Clarke v. Birmingham and Pittsburgh Bridge Co.....	168
Burnham v. Morrissey.....	441, 442, 443, 444	Clark v. Clement.....	107
Burroughs v. Housatonic R. R. Co.....	172	Clark v. Cordis.....	746
Burroughs v. Norwich & Worcester Railroad Co.....	25, 26, 39, 724	Clark v. City of Rochester.....	439, 443
Burrows v. Unwin.....	205	Clark v. City of Wilmington.....	177
Burrows v. Lock.....	117, 122	Clark v. Delaware and Hudson River Railroad Co.....	558
Bushnell v. Beloit.....	483, 440, 444	Clark v. Hancock Co.....	439
Butler v. Dunham.....	438	Clark v. Janesville.....	483, 440, 444
Butler v. Northumberland.....	130, 141	Clark v. McDonald.....	508
Burt v. Williams.....	490	Clark v. Montague.....	685
Bushwick Avenue, Matter of.....	164	Clarke v. Rochester, etc. R. R. Co.....	496
Byrd v. Ralston.....	438	Clemmons v. Hampton.....	599
		Clive v. Clive.....	615
		Coal Co. v. Blatchford.....	542

TABLE OF CASES CITED.

xiii

	PAGE.		PAGE.
Costa v. Robinson.....	484	Commonwealth v. Wade.....	308
Costa v. New York.....	698	Commonwealth v. Waite.....	713
Cobb v. Farr.....	133	Commonwealth v. Willard.....	133
Cockshatt v. Bennett.....	332	Company v. Goodale.....	160
Coffman v. Hampton.....	52	Comstock's Case.....	743
Coggs v. Bernard.....	44	Conkey v. Hart.....	487
Cook v. Bank.....	551, 557	Conolly v. Taylor.....	545
Cook v. Bennett.....	62	Corn Exchange Ins. Co. v. Babcock.....	468
Cook's case.....	207	Converse v. N. & N. Y. T. Co.....	36
Cook v. Ellis.....	198	Conway v. Alexander.....	682
Cooper v. Martin.....	333	Copes v. Charleston.....	430, 443
Coldwell v. Sawyer.....	470	Coquillard, Adm'r, v. Bearss.....	506
Collins v. Bristol and Exeter R'y Co.....	11	Corbett v. Norcross.....	122
Collins Iron Co. v. Buckham.....	284	Cornelius v. Glen.....	164
Collins v. Lavenberg.....	484	Cornett v. Williams.....	551
Collins v. Rudolph.....	484	Cornish v. Abington.....	665
Coll v. Hagger.....	487	Corporation of New Orleans v. Winter et al.....	541
Cooldice v. Cuthrie.....	561	Corser v. Paul.....	73
Colder v. Bull.....	347	Coster v. Mayor of Albany.....	168
Com. v. Hartwell.....	550	Costner v. Symonds.....	468
Com. v. Motz.....	116	Cota v. Buck.....	668
Commercial Bank v. Buckner.....	743	Cotten v. County Comm'rs.....	468
Comm'rs Homochitto river v. Withers.....	168	Cotterell v. Purchase.....	679, 682
Comm'rs of Knox Co. v. Wallace.....	498		
Cornett v. Williams.....	530	D. & P. R. R. Co. v. Dubuque.....	439
Com. Bank of Natchez v. Chambers.....	487	Daland v. Williams.....	668
Commonwealth v. Alger.....	697	Dalton v. Murphy.....	321, 328
Commonwealth v. Andrews.....	704	Daniel v. Robinson.....	326
Commonwealth v. Aves.....	533	Daniels v. Alvord.....	676
Commonwealth v. Brown.....	712	Danks v. Quackenbush.....	438
Commonwealth v. Burke.....	291	Danville v. R. R. Co.....	442, 465
Commonwealth v. Cluley.....	342	Darling v. Boston & W. R. R. Co.....	24, 25
Commonwealth v. Com'rs Allegheny Co.....	438	Darnell's Case.....	27
Commonwealth v. Dewell.....	348	Davidson v. Boston & Maine R. R.....	168
Commonwealth v. Downing.....	133	Davis v. Burrell.....	95, 98
Commonwealth v. Fowler.....	567	Davis v. Fog.....	327
Commonwealth v. Gorham.....	705	Davis v. Glak.....	323
Commonwealth v. Green.....	713	Davis v. Handy.....	70, 125
Commonwealth v. Green.....	470	Davis v. Hill.....	54, 63
Commonwealth v. Harris.....	705	Davison v. Wilson.....	95
Commonwealth v. Hill.....	816	Davy v. Haddon.....	137
Commonwealth v. Ladd.....	712	Dawkins v. Paulet.....	741
Commonwealth v. Lahy.....	705	Dawkins v. Rokeby.....	739, 741
Commonwealth v. McWilliams.....	438	De Bouvoir v. De Bouvoir.....	746
Commonwealth v. Manly.....	705	Dearfield v. Arms.....	144
Commonwealth v. Mash.....	712	Dedham's Inst. of Savings v. Slack.....	78
Commonwealth v. Parker.....	713	Delano v. Goodwin.....	89
Commonwealth v. Perkins.....	438	Delano v. Goodwin.....	68
Commonwealth v. Pittsburgh.....	438	Delaware & Haritan Canal Co. v. Lee.....	149
Commonwealth v. Richards.....	703	Den v. Lord Abingdon.....	223
Commonwealth v. Rhoades.....	106	De Wolf v. Haydn.....	493
Commonwealth v. Richter.....	168	Dezell v. Odell.....	116, 123, 124
Commonwealth v. Roby.....	705	Dickinson v. Boyle.....	668
Columbian Insurance Co. v. Ashby.....	729	Dickinson v. Lovell.....	143
Couch v. Steel.....	693	Dickinson v. Worcester.....	176
Cowles v. Bacon.....	122	Dickson v. Wilton.....	741
Cowles v. Morgan.....	494	Dillon v. Brown.....	667, 669
Coxan v. Great Western Ry. Co.....	16	Dillon v. N. Y. & E. Ry. Co.....	39
Cranch v. L. & N. W. Ry. Co.....	84	Ditson v. Ditson.....	272
Creal v. Keokuk.....	176	Dixon v. Parker.....	675
Crease v. Babcock.....	237	Dixon v. Ramsay.....	108
Crawford v. The village of Delaware.....	158	Dobblin v. Hubbard.....	479
Crenshaw v. Slate River Co.....	164	Dodd v. Kyffin.....	95
Critchler v. Holloway.....	591	Dodge v. County Commissioners.....	166
Crofts v. Waterhouse.....	725	Dodge v. Woolsey.....	510
Cunningham v. Mitchell.....	468	Dodge v. Perkins.....	551
Cuggs v. Bernard.....	2	Doe v. Georgia Railroad Co.....	587
Cushman v. Loker.....	705	Doe v. Oliver.....	498
Cushman v. Smith.....	169	Doe v. Wright.....	93
Curtl v. Compton.....	323	Doennan v. The People.....	443
Curtis v. Eastern R. R. Co.....	167	Doorman v. Jenkins.....	44
Curtis v. Galvin.....	88, 96, 100	Doran's Case.....	189
Curtis v. Leavitt.....	13	Dorr v. New Jersey S. Nav. Co.....	279
Cusick v. Douglas.....	488	Dorris v. Grace.....	581
Cutler v. Whittemore.....	689	Doty v. Mitchell.....	324
Cutts v. Brainard.....	40	Dow v. Sanborn.....	738
Commonwealth v. Sampson.....	724	Dowdle v. Camp.....	512
Commonwealth v. Sawtelle.....	816	Downer v. Madison County Bank.....	598
Commonwealth v. Tewksbury.....	697		

	PAGE.		PAGE.
Drawbridge Co. v. Shepherd.....	546	Foy v. T. & B. R. R. Co.....	28
Drew v. Kimball.....	70, 125, 126	France v. France.....	225
Duchess of Kingston's Case.....	136	Franklin v. Flak.....	177
Dubuque v. Dubuque R. R. Co.....	433	Freeman v. Cruikshanks.....	468
Dudley v. Sawyer.....	53	Freeman v. Arkell.....	684
Dunbar v. Meyer.....	323	Freeman v. Cooke.....	115, 119, 131, 140
Durcan v. Baird.....	813	French v. Techemaker.....	425
Douglas Co. v. Upper P. Ry. Co.....	492	Frink v. Frink.....	135, 138
Dunn v. Dunn.....	137	Frost v. Doyle.....	328
Dustin v. Cowdry.....	98, 99	Frost v. Etheridge.....	609
Dwight v. Brewster.....	501, 778	Frost v. Inhab. of Belmont.....	506
Dye v. Mann.....	304	Frost v. Saratoga Co.....	124
Dyer v. Cady.....	122	Fuhr v. Dean.....	92
Dyer v. Dyer.....	113	Fuller v. Bean.....	66, 64
Dykes v. Blake.....	49, 52	Fuller v. Edings.....	171
Earl of Shaftesbury.....	636	Funnel v. Pettifjohn.....	499
Earl v. Tupper.....	199	Gale v. Lindo.....	113, 118
Earl v. Vass.....	739	Gale v. Nixon.....	217
Eastman v. Amoskeag Manuf. Co.....	151	Galpin v. Critchlow.....	559
Eastman v. Company.....	150	Gannon v. Hargadon.....	176
Eastman v. Meredith.....	170, 171	Gardner v. Gardner.....	325, 326
East Ind. Co. v. Vincent.....	113	Gardner v. Mayor of Troy.....	631
Eastwood v. Kenyon.....	332, 334	Gardner v. Village of Newburgh.....	164
Eaton v. Green.....	678, 681	Gardner v. Walsh.....	308
Edson v. Edson.....	138	Garland, Ex parte.....	570, 714
Edwards v. Darby.....	713	Garland v. Lane.....	141
Ehle v. Judson.....	833	Garrett v. Cheshire.....	525
Eldred v. Hazlett.....	122	Garrett v. Dabney.....	328
Ellason v. Henshaw.....	581	Gras v. N. Y. P. & B. R. R. Co.....	25
Elmore v. Naugatuck R. R. Co.....	26	Gassett v. Godfrey.....	141
Elliot v. Thomas.....	52	Geer v. Archer.....	333
Emmons v. Overton.....	328	Gelpcke v. City of Dubuque.....	443
Enfield Toll Bridge Co. v. Hartf. & N. H. R. R. Co.....	161	Gelston v. Hoyt.....	293
Erie & N. E. R. R. Co. v. Casey.....	237, 238	General Ins. Co. v. Sherwood.....	731
Erskine v. Townsend.....	678	Gibbons v. Mobile, etc.....	439
Erwin v. Olmstead.....	96	Gilbert v. New York R. Ry. Co.....	439
Estabrooks v. P. & S. R. Co.....	157, 166, 167	Gibson v. Chouteau's Heirs.....	498
Evans v. Bicknell.....	113	Gibson v. Mason.....	442, 452
Evansville, etc., R. R. v. Evansville.....	439	Gibson v. Stevens.....	142
Evansville & Crawfordville R. R. Co. v. Dick.....	164, 170	Gilbertson v. Richardson.....	693
Everett v. Derby.....	743	Gilman v. Hall.....	54
Exchange Bank of Columbia et al. v. Tiddy.....	617, 620	Gilshannon v. Stony Brook.....	478
Exchange Bank of Virginia v. Knox.....	630	Gittings v. McDermott.....	748
Fairman v. Ives.....	741	Glover v. Hubert.....	674, 675
Falmouth, Case of.....	704	Glover v. Powell.....	164
Farmer v. Webber.....	113, 114, 118	Goodall v. City of Milwaukee.....	158, 165
Farmers & Mec. Bank v. Champl. Trans. Co.....	36, 38, 421	Goodall v. Marshall.....	108
Farmers & Mech. Bank v. Smith.....	489	Goodenow v. Tyler.....	46
Farnham v. Camden.....	53	Goodin v. Crumps.....	438
Ferguson v. Cliford.....	136	Goodyear v. Rubber Co.....	615
Ferrin v. Symonds.....	96	Goodwin v. Hardy.....	310
Ferrin v. Simpson.....	217	Goodman v. Gilbert.....	217
Finney v. Appar.....	58	Goodwin v. Jones.....	108
Fisher v. McGin.....	697	Gorbitt v. Watson.....	57
Flak v. Chicago R. R. Co.....	542	Gordan v. Norris.....	79
Fitch & Worcester R. R. Co. v. Hanna.....	23	Gorham v. Fisher.....	57
Flagg v. Mann.....	677, 678, 681	Goshorn v. Sup. Ohio Co.....	449
Flagg v. Palmyra.....	439	Goslin v. Wilcock.....	683
Flagg v. Worcester.....	176	Gould v. Hudson R. R. R.....	168
Fleckner v. Bank of United States.....	72	Gould v. Town of Venice.....	439
Fleece v. Goodrum.....	468	Goulding v. Davidson.....	334, 335
Fletcher v. Aub. & Syr. R. R. Co.....	150	Gov. of B. C. P. M. v. Meredith.....	181
Fletcher v. Peck.....	514, 515, 519	Grant v. Courter.....	439, 443
Fletcher v. Willard.....	680	Graves v. Graves.....	99, 62
Forsyth v. Marbury.....	488, 489	Gray v. Deluce.....	145
Forsyth v. Morse.....	96	Gray v. Pentland.....	740
Fosdick Perryburg.....	438	Great Falls Manuf. Co. v. Worster.....	126
Fowles v. G. W. Ry. Co.....	10	Great Western Railway Co. v. Blake.....	17
Fox v. Ohio.....	293	Great Western Railway Co. v. Hawkins.....	281
Foxworth v. Magee.....	328	Greene v. Greene.....	138
		Green v. Reading.....	176
		Greeley v. Maine Central R. R.....	173
		Green v. Biddle.....	515, 518
		Greer v. McCarter.....	496
		Gregg v. Wells.....	120, 121, 124, 125
		Greely v. Bartlett.....	46

TABLE OF CASES CITED.

IX

	PAGE.		PAGE.
Griffing v. Cunningham.....	847	Holmes v. Trumper.....	807
Griffing v. Mills.....	844	Hood v. N. Y. & N. H. R. R. Co.....	96
Greschla v. People.....	814	Hood v. Rogersville, etc., R. R. Co.....	438
Grimes v. Van Vochten.....	813	Hooker v. The New Haven & North-	
Gunn v. Barry.....	650, 651 652	ampton Co.....	150, 164
Hart v. Pomeroy.....	807	Hooksett v. Company.....	150
Haines v. Tucker.....	79	Home v. Bentinck.....	739, 741
Hall v. Keese.....	531	Home Life Ins. Co. v. Dunn.....	558
Hale v. Taylor.....	39, 63	Homer v. Fish.....	135
Hall v. Williams.....	110	Horton v. Green.....	632
Hamlet v. Richardson.....	690	Hortman v. Covington & Lexington	
Hamilton v. Boston.....	724	R. R. Co.....	167
Hanbury v. Hussey.....	229	Houghton v. Kendall.....	746
Hanover v. Turner.....	271	Houghton v. Matthews.....	45
Hansen v. Meyer.....	63, 65	Houston v. Lafce.....	584
Hansen v. Vernon.....	443, 444	House v. Foster.....	215
Hapgood v. Batcheller.....	46	Howard v. Hudson.....	116, 121
Harcourt's Case.....	208	Howard v. Thompson.....	740
Harding v. Alden.....	136, 138	Hoyt v. City of Hudson.....	177
Harrell v. Watson.....	521	Hoyt v. Saginaw.....	463
Harris v. Brooks.....	71	Hubbard v. Northern R. R. Co.....	542
Harris v. Roof's Exr.....	505	Huggins v. King.....	136
Harrison, Justices, v. Holland.....	438	Hughes v. Edwards.....	677
Harrison v. South Hampton.....	137	Hughes v. Letsey et al.....	561
Harrison v. Stipp.....	490	Humboldt Co. v. Churchill Co. Com'rs.....	235
Hart v. Mills.....	52	Humes v. Mayor, etc., of Knoxville.....	178
Hart v. R. & S. R. R. Co.....	29	Humphreys v. Sweet.....	723
Harvey v. Brydges.....	95, 96, 101, 102	Huneden v. Cheyney.....	113, 117, 122
Harvey v. Lloyd.....	438	Hunt v. N. Y. & E. Railway Co.....	29
Hasbrouck v. City of Milwaukee.....	452	Hunt v. State.....	470
Hasbrouck v. Shipman.....	487, 490	Hurlins v. Shipman.....	583
Haslitt v. Harris.....	531	Hyatt v. Wood.....	95, 97, 100
Hatch v. Vermont Cent. R. R. 156, 167, 173		Hyde v. T. N. Co.....	3, 4
Hawes v. Marchant.....	120, 665	Hyle v. L. R. Co.....	82
Hawkins' Case.....	208, 204	Illinois Cent. R. R. Co. v. Copeland.....	32
Hawkins v. Filkins.....	847	Illinois Cent. R. R. Co. v. Frankenberg.....	40
Hawthorne v. Calef.....	430, 515	Illinois Cent. R. R. Co. v. Johnson.....	33
Hawthorn v. Germania Ins. Co.....	580	Indiana Cent. R. Co. v. Boden.....	166
Hanton v. Corse.....	743	Ingram v. Kirkpatrick.....	622
Hay v. Cohoes Co.....	164	Inhabitants of Dunstable v. Thacher.....	105
Hay v. State.....	816	Insurance Company v. Dunn.....	552
Hayes v. S. W. Railway Co.....	19	Irvine v. Lowry.....	544
Hazard v. Durant.....	543, 551	Islay v. Stewart.....	33
Hempstead v. N. Y. Cent. R. R. Co.....	30	Ives v. Bank of Lansingburgh.....	256
Henderson v. Pope.....	523, 594, 596	Ives v. Ives.....	94, 97
Henderson & Nashville R. R. Co. v. Dickerson.....	843	Jackson v. Farmer.....	96, 97
Hennen, Ex parte.....	104	Jackson v. How.....	457
Henniker v. Contoocook Valley R. R.....	166	Jackson v. Hubble.....	433
Henry v. Pittsburgh, etc., Co.....	175, 178	Jackson v. Morse.....	96
Henry v. Vermont Central R. R. Co.....	172	Jacoway v. Denton.....	457
Herridon v. Ridgway.....	543	Jacques v. Chambers.....	615
Herrick v. Johnson.....	609, 670	Jacques v. Methodist Church.....	325
Heydock's Appeal.....	108	James v. Harris.....	571, 601
Hibbard v. Eastman.....	156	Jarman v. Ward.....	601
Higgs v. Dorkis.....	225	Jarmin v. Wilkerson.....	477
Higgins v. Hannibal & St. Jo. R. R.....	99	Jenkins v. Eldridge.....	677
Hillary v. Gay.....	96, 99	Jenneson v. C. & A. R. & T. Co.....	163
Hillbourne v. Fogg.....	96	Jennings, Ex parte.....	165
Hill v. Keese.....	650, 651, 652	Jersey City & Bergen R. R. Co. v. Jersey	
Hill Manuf. Co. v. Boston & L. Corp.....	26	City & Hoboken H. R. R. Co.....	164
Hill Manuf. Co. v. B. & L. R. R. Co.....	724	Jewett v. Locke.....	685
Hinchman v. Paterson Horse R.R. Co.....	160	Johnson v. Atlantic & St. L. R. Co.....	157
Hind v. Whitehouse.....	54	Johnson v. Hannahan.....	93
Hines v. Leavenworth.....	463	Johnson v. Johnson.....	49
Hinsdale v. Humphreys.....	217	Johnson v. Midland Railway Co.....	501
Elias v. Bartlett.....	236	Johnson v. Monell.....	552
Hobart v. Supervisors of Butte Co.....	440	Johnson v. M. R. Co.....	84
Hobbs v. Norton.....	113, 122	Johnson Co. v. Bugg.....	435
Hodgden v. Hubbard.....	94, 98, 117	Johnson v. Stark Co.....	438
Hoffman v. Coster.....	571	Johnson v. M. Railway Co.....	2
Hoffman v. Hoffman.....	574	Jones v. Cavins.....	245
Hoffman v. St. Louis.....	176	Jones v. Crosthwaite.....	435
Hoke v. Henderson.....	607	Jones v. Glvin.....	684
Holland v. Hoyt.....	313	Jones v. Harris.....	571
Hollister v. Union Co.....	126, 313	Jones v. Morris.....	601
Holmes' Case.....	303	Jones v. State.....	470
		Jorden v. Money.....	120, 121

TABLE OF CASES CITED.

PAGE.	PAGE.
Joynes v. Statham.....	675
Judge of Probate v. Webster.....	135
Justices of Campbell Co. v. Knoxville & Ky. R. R. Co.....	438
Justice, etc., v. P. W. & R. R. Turn- pike Co.....	438
Kansas Pacific Railway Co. v. Nichols.....	282
Kansas Pacific Ry. Co. v. Reynolds.....	496
Keane v. Baycott.....	331
Keasy v. Louisville.....	175, 178
Kenney v. Grand Trunk Railway Co.....	495
Keithsburg v. Fink.....	438
Kellam v. Janson.....	96
Kelsea v. Haines.....	64
Kendall v. Karland.....	669
Kendall v. United States.....	547
Kenyon v. Dickson.....	645
Kennett's Petition.....	166
Keppell's Adm's v. Petersburg R. R. Co.....	555
Kerr v. Kerr.....	138
Kerr v. Railways.....	18
Kimball v. Rutland, etc., R. R. Co.....	495
King v. Beeton.....	706
King v. Blackman.....	741
King v. Crunden.....	639
King v. Diggle.....	7
King v. Gilson's Adm'r.....	498
King v. Richardson.....	706
King v. Wilson.....	443, 465
Kingsbury v. Fleming.....	599
Kingsbury v. Pond.....	90, 98
Killoran v. Brown.....	678
Kinney v. Farnsworth.....	125
Kinnier v. Kinnier.....	271
Kittredge v. Folsom.....	107
Knight v. P. S. & P. Railway Co.....	19
Knox v. Nichols.....	438
Krevet v. Meyer.....	96
Ladd v. Adams.....	652
L. M. & B. R. R. Co. v. Griger.....	483, 465
Lafayette v. Spencer.....	179
Laird v. Pim.....	78
L. S. & M. S. R. R. Co. v. Perf. Ins.....	500
Lambaun v. Hartswick.....	349
Lamlee v. Hanman.....	113
Lamb v. Camden, etc., R. R. Co.....	40
Lamb v. Lynd.....	236
Lane v. Cotton.....	2, 501
Langdon v. Doud.....	120
Langhorne v. Robinson.....	433, 465
Lansing v. Smith.....	167
Lapeyre v. Braashears.....	487
Lathrop v. Commercial Bank.....	255
Lansatt v. Lippincott.....	46
League v. De Young.....	349
Leavenworth v. Miller.....	496
Le Barren v. East Boston Ferry Co.....	725
Le Bretan v. Miles.....	321
Leconfield v. Lonsdale.....	156
Lee v. Gansel.....	705
Lee v. Griffin.....	55
Lee v. Pembroke Iron Co.....	150, 164, 168
Lee v. Muggridge.....	331, 333, 335
Lee v. Riley.....	698
Lee Co. v. Rodgers.....	443
Leith v. Leith.....	272
Leland v. Douglass.....	46
Leland v. Hayden.....	688
Leslie v. Langham's Exors.....	531
Lewis v. Webb.....	348
Lexington, etc., R. R. Co. v. Applegate.....	458
Lincoln v. Wright.....	679
Liggins v. Ince.....	40
Lisbon v. Lyman.....	2, 89
Littlesfield v. Shes.....	331, 333, 335
Lithon v. Commonwealth.....	470
Livingston v. Tanner.....	96
Lombard v. Oliver.....	695
Loring v. Thorndike.....	748
Louisville & N. R. R. Co. v. Davidson Co.....	435
Louisville v. Rolling Mill Co.....	161, 180
Lowenthal v. Mayor of New York.....	171
Lowell v. Oliver.....	24, 22
Lowell Wire Fence Co. v. Sargent.....	331, 333, 334
Loyd v. Lee.....	134
Lucas v. Hart.....	128
Lucas v. New Bedford R. R. Co.....	478
Ludlow v. Simond.....	322
Lumbard v. Aldrich.....	255
Lusher v. Scites.....	235
Lyon v. Lyon.....	271
Lyon v. Reed.....	115
Lynde v. McGregor.....	734
Macomber v. Parker.....	6
Mace v. Cushman.....	746, 747
Macy v. Indianapolis.....	178
Maddox v. Graham.....	436
Madrazo v. Willes.....	568
Maguire v. Maguire.....	273
Mahurin v. Pearson.....	71
Mailard v. Lawrence.....	457, 441
Manners v. Charlesworth.....	334, 238
Mann v. Blount.....	617
Marbury v. Madison.....	739
March's Case.....	303
March v. P. & C. R. R.....	156
Markham v. Brown.....	92
Marriott v. Hampton.....	699, 650
Marshall v. Baltimore & O. R. R. Co.....	505
Marshall v. Railroad.....	546
Marston v. Gale.....	86
Martin, Ex parte.....	164
Martin v. McMillan.....	569
Marx v. Fore.....	274
Mather v. Bush.....	487
Matter of Brown.....	583
Matter of Bushwick Ave.....	164
Maunch Chunk v. Wiscopeck.....	458
Mauran v. Insurance Company.....	557
Maxwell v. Montacute.....	57, 5
May v. Mitchell.....	48
May v. Sperry.....	396
Mayor, etc. of Baltimore v. State.....	441
Mayor v. Cunliff.....	43
McCaughy v. Smith.....	303
McClure v. Manchester & Lawrence R. R. Co.....	724
McClure v. Owen.....	443
McCombs v. Town Council of Akron.....	174
McCool v. Smith.....	550
McCormick v. Halbrook.....	479, 490
McCord v. High.....	164, 170, 180
McCardle, ex parte.....	235
McCracken v. Hayward.....	487, 490, 494
McCrackin v. Wright.....	515
McCulloch v. Maryland.....	448, 455
McDonald v. Rooke.....	694
McElveney v. Connellan.....	743
McGiffert v. McGiffert.....	272
McIntyre v. Park.....	668
McIntire v. Wood.....	547
McKeathen v. Terry.....	651, 652
McKee v. Wilcox.....	164
McKeen v. Delaware Div. Canal Co.....	303
McKies' Case.....	304
McLeod v. Dncan.....	575
McMahon v. Portsmouth Ins. Co.....	128
McCardle, Ex parte.....	225
McMillan v. Boyles.....	439
McMillan v. Lee Co.....	439
McMillan v. McNeil.....	439
McNeal v. Woods.....	308
Meade's Case.....	306, 309
Meador v. Stone.....	96, 100

TABLE OF CASES CITED.

XVII

	PAGE.		PAGE.
Mellen v. Western R. R.	157, 167	New Orleans v. Graible ...	433, 438
Mellor v. Lee	679	Newton v. Eddy	148
Menzies v. Macdonald	230	Newton v. Fay	674
Merrithew v. Sampson	729	Newton v. Harland	98, 99, 101
Merrill v. Sherburne	348	New York Dry Dock v. Hicks	255
Merrick v. Van Santvoord	249	Norris v. Merrill	39
Merrill v. Nary	205	Norris v. Vt. Cent. R. R.	167
Merriam v. Willis	90, 95	Norton's Assignee v. Boyd	273
Messer v. Woodman	54	Norton v. McCall	652
Meyers v. Muscatine	443	North Missouri R. R. Co. v. Akers	496
Meyer v. Haworth	331	Norton v. Turrill	323
Mitchell v. Williams	684	Nichol v. Nashville	438
Michigan Central R. R. Co. v. Hale	281	Nichols v. Smith	221
Michigan Southern & N. I. R. R. Co. v. McDonough	277, 281, 282, 436	Nicholle v. Plume	61
Milnes v. Duncan	630	Nicholson v. Coghill	684
Miller v. Brown	494	Nickerson v. Tyson	729
Miller v. McIntyre	660	Nutting v. C. R. R. Co.	23
Miligan, Ex parte	529	N. Y. and Erie R. R. v. Young	168
Milnes v. Duncan	630	Oates v. Hudson	631
Miller v. Miller	222	Ockington v. Richey	64
Mills v. Brooklyn	171	O'Connor v. Pittsburgh	166, 177, 179
Mills v. Hunt	51	Odlin v. Gove	70, 126
Mills v. Wyman	334	O'Donohue v. McGovern	741
Miner v. Sterens	90, 92	Ogden v. Saunders	439, 515
Miner's Bank v. United States Bank	237	Old Colony R. R. Co. v. Evans	78
Miner's Ditch Co. v. Zeleerbach	451	Olney v. Chadsey	73
Minot v. Paine	615, 688	Oliver v. Worcester	171
Mitchell v. Reed	119, 123, 124	O'Neal v. Baker	601
Mittelholzer v. Fullerton	532, 533	Overdeen v. Lewis	96
Mosie v. Mayor of Baltimore	164	Osborne v. Nicholson	538
Moers v. City of Reading	438	Osborn v. United States Bank	451
McFatt v. Soley	541, 548	Osgood v. Parsons	663
Monongahela Bridge Co. v. Kirk	168	Owen v. Cowley	482
Monongahela Nav. Co. v. Corris	168	Ozley v. Ixelheimer	484
Montgomery v. Agricultural Bank	327		
Moore v. Fowler	437, 439	Palmer v. Grand Junction Ry. Co.	503
Morgan v. Elam	328	Parham v. Justices of Decatur Co.	588
Morgan v. Hughes	684	Paris v. Paris	614, 615
Morgan v. King	164	Parish v. Parish	138
Moore v. Mason	95, 100	Parker et al., matter of	564
Morrill v. Dickey	109	Parker v. Farley	683
Morrill v. De la Granja	95	Parker v. Gerard	224, 226
Morris v. Nixon	677	Parker v. Scogin	439
Morse v. Branerd	22	Parks v. Hall	678
Morse v. Child	255	Parsons v. Camp	87
Morse v. Gould	438, 439	Partee v. Stillman	339
Morse v. Slue	501	Pasley v. Freeman	43
Morse v. Stocker	164	Patrick v. Colerick	87, 95
Morton v. Barrett	746	Patridge v. Gilbert	719
Moss v. Johnson	479	Patten v. People	313
Moses v. B. & M. R. R. Co.	23, 33, 40	Pattison v. Board of Supervisors of Yuba Co.	433, 440
Mt. Washington R. R. Co. Petition of	151	Patton v. Kinsman	479, 485
Mt. Washington Road Co., Petition of	171	Pawling v. Bird's Ex'rs	273
Mundy v. Mundy	225	Peabody v. Minot	221
Mugford v. Richardson	90, 96	Peacock v. Monk	325
Muir v. Demurce	308	Peck v. Woodbridge	138
Murray v. Barlee	326	Pendergast v. Adams Ex. Co.	26
Murray v. The Justices of New York	552	Pemberton v. Barnes	225
Murray v. Sharp	165	Pennock v. Dialogue	550
Murray v. Simonds	310	People v. Brown	307
Munehamp v. L. & P. J. R. Co.	5, 7, 13, 15, 81	People ex rel. Case v. Judges	470
Mussey v. Scott	87, 94, 96, 98	People v. Clute	341, 343
Mytton v. Midland Railway Co.	15	People v. Coon	440
		People v. Cornwell	237, 238
Najac v. Boston & Lowell R. R. Co.	24, 724	People v. Draper	235
Nash v. Russell	384, 386	People v. Fields	96, 97
Nashua Lock Co. v. W. & N. R. R. Co.	20	People v. Gilman	470
	21, 23, 24, 38, 40	People v. Gilmore	473
Naugatuck R. Co. v. W. B. Co.	26	People v. Kerr	153, 153, 163
Needham, In re	743	People ex rel. Loomis v. Canal Apprs	168
Nelson v. Rountree	487	People v. Leonard	96
Nelson v. Suffolk Insurance Co.	731	People v. Mahany	235, 236, 434
Nevins v. City of Peoria	153, 155, 165, 180	People v. Mayor of Brooklyn	161
Nettleton v. Stokes	87	People v. Mitchell	439, 443, 444
Neville v. Wilkinson	113	People v. Munson	479
Newell v. March	629	People v. Nearing	164
N. J. St. Nav. Co. v. Merchants' Bank	279	People v. Platt	164
Newman v. Hook	122		

	PAGE.		PAGE.
People v. Potter.....	566	Rateaw v. Bernard.....	551
People v. Quin.....	291	Rathbone v. Fowler.....	738
People v. Salem.....	444, 460, 496	Raw v. Pote.....	113, 114
People v. State.....	449	Rawler v. Hooker.....	490
People v. Sup'rs of San Francisco.....	440	Rawson v. Morse.....	86, 96
People v. Tibbetts.....	168	Rea v. Cutler.....	729
People v. Van Blaricum.....	333	Reading v. Keppleman.....	176
People v. Van Nostrand.....	96	Reed v. Currier.....	192
Peoria M. & F. Ins. Co. v. Botts.....	580	Reed v. Slate.....	316
Perkins v. Lewis.....	438	Rees v. Harrington.....	236
Perkins v. P. S. & P. R. Co.....	19	Reeves v. Treasurer of Wood Co.....	174, 164
Perkins v. Stevens.....	566, 570	Reg. v. Ball.....	211
Perry v. Worcester.....	167	Reg. v. Barran.....	221
Peet v. C. & N. W. R. Co.....	83	Reg. v. Camplin.....	266
Peters v. Peters.....	551, 575	Reg. v. Candy.....	741
Peters v. Warren Insurance Co.....	731	Reg. v. Case.....	220
Pettigrew v. Village of Evansville.....	155, 171	Reg. v. Clarke.....	257
Petition of Mount Washington R. R. Co.....	177, 180	Reg. v. Cooks.....	242
Petty v. Mailer.....	151	Reg. v. Eastern Counties Ry. Co.....	267
Peyton v. Loudon.....	226	Reg. v. Fletcher.....	289
Phelps v. Farmers' Bank.....	719	Reg. v. Hallett.....	291
Phillips v. Higdon.....	615	Reg. v. Mayers.....	291
Platt v. People.....	659	Reg. v. Richardson.....	741
Pickard v. Sears.....	113, 118, 121, 125	Reg. v. Saunders.....	257
Pickett v. Wilkins.....	531	Reg. v. Stanton.....	291
Picquet's Case.....	346	Reg. v. Webb.....	640
Pierce v. Street.....	884	Reg. v. Williams.....	257
Piscataqua Bridge v. N. E. Bridge.....	151	Regents v. Detroit Y. M. S.....	254
	180	Rex v. Akers.....	738
Pitkin v. Noyes.....	58	Rex v. Bridge.....	342
Pitt v. Combs.....	631	Rex v. Deane.....	94
Planters' Bank v. Sharpe.....	516, 519, 533	Rex v. Hardy.....	738
Pleasant v. State.....	289	Rex v. Jackson.....	227
Plumb v. Morris Canal & Banking Co.....	179	Rex v. Loyd.....	640
Plumer v. Lord.....	119, 120	Rex v. Parry.....	342
Powell v. Hill.....	602	Rex v. Parsons.....	706
Pool v. Allen.....	629	Rex v. Radley.....	817
Police Jury v. McDonough's succession.....	433, 438	Rex v. Robinson.....	316
Pollen v. Brewer.....	95, 98	Rex v. Ryan.....	245
Polly v. Sar. & Wash. R. R. Co.....	169	Rex v. Wallis.....	308
Pond v. People.....	213	Rex v. Walker.....	316
Pool v. Allen.....	629	Rex v. Watson.....	738
Poole v. Shergold.....	49	Reynolds v. Shreveport.....	176, 176
Porter v. Hill.....	220, 229	Rheel v. Hicks.....	631
Porterfield v. Humphrey.....	502	Rice v. Peet.....	813
Portland Bank v. Apthorp.....	441	Rice v. Rice.....	678, 681
Powell v. Hill.....	602, 627	Richards v. Edick.....	79
Powers v. Inf. Ct. of Dougherty Co.....	439	Richards v. L. B. & S. O. Railway Co.....	34
Powers, guardian, v. Mortee.....	109	Richards v. Ross.....	718
Pratt v. Brown.....	452	Richardson v. Chickering.....	128
Pratt v. Fanner.....	96	Richardson v. Vt. Cent. R. R. Co.....	164, 173
Preston v. Mann.....	117, 122, 125	Richm. & Lex., Turnp. Co. v. Rogers.....	171
Preston v. Norris.....	130	Rickett v. Directors, etc., of Metropol- itan Railway Co.....	163
Prettyman v. Sup. Tazewell Co.....	433, 438	Ridge St., In re.....	170
Price v. Poynter.....	561	Rigg v. Welton.....	550
Prigg v. Commonwealth of Penn.....	528	Riggs v. Johnson Co.....	443
Primm v. Walker.....	223	Ring v. Burt.....	304
Prize cases.....	559	Ring v. Johnson Co.....	439
Proprietors of Locks and Canals v. N. & Lowell R. R. Co.....	166	Roach v. Garvan.....	137
Pumpelly v. Green Bay Co.....	163, 164	Robb v. Ross County Bank.....	73
Quackenbush v. Danks.....	488	Roberts v. Chicago.....	176
Queen v. Hadfield.....	716	Robertson v. Livingston.....	46
Quimby v. Vanderbilt.....	80	Robertson v. N. Y. & E. R. R. Co.....	479
Quirk v. Thomas.....	123, 124	Robertson v. Rockford.....	438
		Robbins v. Milwaukee, etc., R. R. Co.....	453
Radcliff's ex'rs v. Mayer of Brooklyn.....	177	Robinson, In re.....	193, 743
Railroad Bank v. Slocomb.....	546	Robinson v. Bidwell.....	440
Railroad Co. v. Letson.....	546	Robinson v. Howe.....	487
Railroad Co. v. Spratt.....	83	Robinson v. May.....	728
Railroad Co. v. Sullivan.....	82	Robinson v. N. Y. & E. R. R.....	145
Railroad Co. v. Wheeler.....	546	Roby v. West.....	130
Railway Co. v. Whitton.....	548	Rockwell v. Hubbell's & Son.....	638
Raleigh, etc., R. R. Co. v. Davis.....	452	Roe v. Jerome.....	158
Rapelve v. Mackie.....	63	Rogers v. Burlington.....	449
		Roll v. Augusta.....	177
		Rome v. Omberg.....	177
		Ronkendorff v. Taylor.....	104
		Ross v. Norman.....	684

TABLE OF CASES CITED.

X11

	PAGE.		PAGE.
Roots, In re	746	Soena v. City of Racine	458
Roots v. Lord Dormer	49	Schothorn v. S. B. R. Co.	10
Rounds v. Mumford	176, 178	Society for Savings v. New London	458
Rowe v. Granite Bridge Corporation	168	Sparhawk and Wife v. Bullard	145, 147
Rowe v. Table Mountain Water Co	487	Spalding's Case	388
Rowley v. Bigelow	735	Speer v. School Directors of Blairsv'a	448
Ruchamaboye v. Mottichmed	550	Springer v. Foster	108
Runyan v. Foster's Lessee	249	Sprague v. Litherberry	163
Russ v. Wingate	328	Spring v. Russell	677
Russell v. Carrington	68, 64	Sprigg v. Bank of Mount Pleasant	685
Russell v. Hankey	48	Stackpole v. Arnold	328
Russell v. Hudson Riv. R. R. Co.	478	Stamps v. Green	183
Russell v. Livingston	80	Stanley v. Gaylord	729
Russell v. Southard	677, 681	Star of Hope, The	439, 444
Rust v. Boston Mill Corporation	145	Starr v. Leavitt	228, 228
Rutherford v. Jones	289	Stacy v. Thrasher	107, 111
Ryder v. A. & S. R. R. Co.	438	St. Joseph & C. R. R. v. Buchanan Co.	439
Sabin v. Vt. Cent. R. R.	167	St. John v. Van Santvoord	27, 23
Sackett's Harbor Bank v. Codd	180	St. Louis v. Gurno	177, 180
Sager v. Portsmouth R. R. Co.	495	State v. Bissell	439
Salem Bank v. Gloucester Bank	43, 73	State v. Boal	342
Salisbury v. Herchenroder	155	State v. Bonner	133
Sampson v. Henry	90, 98, 99	State v. Boston, Concord, etc., R.R.Co.	253
Sampson v. United States	349	State v. Commissioners	470
San Antonio v. Jones	443	State v. Commissioners of Hancock Co.	438
Sands v. Smith	552	State v. Commissioners of Nehama Co.	465
Sargent v. Roberts	206	State ex rel. Crawford v. Robinson	434
Satterlee v. Matthews	349	State ex rel. Hurd v. Mayor of Leaven-	
Saunders v. Haynes	341	worth	448
Savage v. Brewer	684	State ex rel. of O.E. v. Smith	341
Sayles v. Briggs	684	State v. Fish	308
Sayles v. Ins. Co.	548	State v. Franklin Falls Co.	151, 164
Schafroth v. A. Mos	484	State of Georgia v. Swearingen	341
Schroeder v. H. R. R. Co.	29	State v. Gilles	341, 342
Scott v. Eastern Cos. Railway Co.	52	State v. Gleason	347
Scott v. Pope	328	State v. Glenn	164
Scott v. Surman	46	State v. Hodge	6, 8, 38
Scott v. Shepherd	693	State v. Hooker	208
Scudder v. Bradford	729	State v. Jarrett	226
Sears v. Cottrell	434	State v. Jones	638, 640
Seaton v. Booth	49	State v. Kilger	245
Seaver v. Boston & Me. R. R. Co.	478	State v. Laverack	164
Seayne's Case	212	State v. Lyon	308
Second v. Garland	484	State v. Matthews	326
Severance v. Carr	89	State v. McDonnell	208
Sewing Machine Companies' Case	545	State v. Morris	470
Sharpless v. Mayor of Phila.	438, 452	State of N. C. v. Trustees of University	656
Shannon v. Shannon	271	State v. Pike	8
Sheldon v. School District	631	State v. Roper	639
Sheldon v. Hill	547	State v. Ross	470
Shepherd v. Prassey	54	State v. Sandy	308
Sherrerd v. Cisco	719	State v. Shepard	298
Shipley v. Fifty Associates	155	State v. Smith	342
Shoemaker v. Goshen Tp.	438	State v. Soper	740
Shunk v. Pres., etc., Schuykill N. Co.	168	State v. Toale	308
Silver Lake Bank v. North	255	State v. Tweedy	470
Sinnickson v. Johnson	150	State v. Town of Hampton	453
Simmons v. City of Camden	176	State v. Union Township	438
Simon v. Steele	126	State v. Van Horne	438
Simpson v. Greeley	492	State v. Waller	638
Sims v. Gurney	729	State v. Wapello Co.	443
Six Carpenters' Case	91	State v. Wayman	443
Skinner v. Hartford Bridge Co.	167	Steadman v. Holman	322
Slaback v. Cushman	551	Stebbins v. Guthrie	442
Slack v. Mayville & L. R. R. Co.	438, 458	Steele v. Western Inland Lock Nav. Co., ...	167
Slater v. Hayward Rubber Co.	729	Stein v. Mayor of Mobile	439
Slatten v. Des Moines Valley R. R. Co.	178	Stuart v. Crowley	532
Slaughter v. State	470	Stuart v. Laird	713
Smith v. Cleveland	437	Steuben, etc., R.R. Co. v. Treas. N. Tp.	438
Smith v. East India Co.	742	Stevens v. Andrews	490
Smith v. Fletcher	154	Stevens v. Commonwealth	303
Smith v. Law	438	Stevens v. Prop's of Middlesex Canal	166
Smith & Longee v. Smith	141	Stevenson v. Mudgett	54
Smith v. Bliss	548	Stevenson v. Williams	553
Smith v. Smith	141, 371, 373	Stevens v. Lyford	79
Smith v. Surman	57	Stewart v. Sup. of Polk Co., 433, 443, 444, 445	
Smith v. Washington	179	Stiles v. Cowper	113, 114
Smith v. Warde	338	Storrs v. Barker	113, 117

	PAGE.		PAGE
Stone v. Peacock.....	64	Tooker's Case.....	220
Stockton & V. R. R. Co. v. Com. Coun. of Stockton.....	485	Tourtou v. Flower.....	108
Strawbridge v. Curtiss.....	541, 545	Toule v. Eastern R. R.....	176
Strang v. People.....	220	Town of Guilford v. Sup. Chenango Co.,	445
Stratton v. Hale.....	326	Tribble v. Frame.....	90
Stratton v. Rastall.....	326	Tracy v. Talmage.....	120
Street Railway v. Cumminsville.....	161	Trask v. Green.....	226
Strickland v. Miss. Cent. R. R. Co.....	439	Tuckerman v. Bigelow.....	545
Strong v. Ellsworth.....	118, 122, 124	Tucker's Lessee v. Moreland.....	331
Strong v. Perkins.....	107	Turner v. Bank.....	547
Sturges v. Bank of Circleville.....	72	Turner v. Cuffin.....	265
Sturges v. Cary.....	729	Turner v. Dartmouth.....	178
Sturgis v. Crownshield.....	459, 514, 515	Turner v. Meymott.....	98
Snyder v. Rockport.....	176	Turner v. Morgan.....	294, 295
Sullivan v. State.....	303	Twitcheil v. Blodgett.....	634
Sullivan v. Mass. Mut. Fire Ins. Co.....	580		
Supreme Court of Maine, Answer of.....	341	Underhill v. Manchester.....	21
Susquehanna Canal Co. v. Wright.....	168	United States v. Bacheider.....	104
Swan v. Stedman.....	667, 668	United States v. Dunn.....	73
Swat. v. Williams.....	450	United States Express Co. v. Rush.....	83
Sweet v. Cutts.....	178, 178	United States v. Gilbert.....	470
Sweet v. Hulbert.....	443	United States v. McKee.....	206
Sweetser v. Hay.....	668	United States v. Moses.....	740
Sweetzer v. Hay.....	670	United States v. Robert.....	104
		United States v. Rhodes.....	531
		United States v. Wagner.....	366
Talbot v. Dent.....	428	United States v. Wilson.....	565, 713
Talbot v. Hudson.....	457	U. P. R. W. Co. E. D. v. Rollins.....	131
Talmage v. Chapel.....	110	Unwin v. Leaper.....	631
Tapley v. Butterfield.....	670	U. S. Bank v. Devenux.....	546
Taunton v. Costar.....	94, 100	U. S. v. Council of Keokuk.....	443
Tartwell v. Horton.....	630, 631	Uther v. Rich.....	310
Taylor v. Barron.....	106, 108, 110		
Taylor v. Betsford.....	205	Valentine v. Piper.....	145
Taylor v. Boardman.....	256	Van Allen v. Vanderpool.....	46
Taylor v. Cole.....	90, 94	Vana v. Wells.....	331
Taylor v. Curtis.....	729	Van Deusen v. Blum.....	697, 699
Taylor v. Luther.....	677	Vandine, petitioner.....	697
Taylor v. Merchants' Fire Ins. Co.....	581	Van Eps v. Schenectady.....	49
Taylor v. Newberne.....	439	Vann Hoffman v. City of Quincy, 515,	688
Taylor v. Robinson.....	734	Van Rensselaer v. Kearney.....	117
Taylor v. Stearns.....	514, 515	Van Santvoord v. St. John.....	34
Taylor v. St. Louis.....	177	Varney v. Young.....	196
Taylor v. Plymouth.....	691	Varnum v. Abbott.....	331
Taylor v. Merch. Fire Ins. Co. of Balti- more.....	581	Vanmeter v. Jones.....	136
Taylor v. Weid.....	678	Vanafra v. Johnson.....	684
Teasdale v. Teasdale.....	118, 117, 122	Village of Lancaster v. Richardson.....	164
Tebbetts v. Tilton.....	135	Vincennes v. Richards.....	179
Tebbetts, Ex parte.....	748	Vincent v. Germond.....	83, 149
Tebbetts v. Tilton.....	137	Vischer v. Vischer.....	272
Ten Eyck v. The Dela. & Haritan Canal Co.....	165	V. S. & T. R. Co. v. Parish of Ouachita,	430
Thayer v. Elliott.....	80		
Thayer v. Rock.....	313	Wabash and Erie Canal v. Spears.....	165
Thomas v. Sorrell.....	86	Waddell v. Mayor of New York.....	176
Thompson v. Kelly.....	428	Waffie v. N. Y. Cent. R. R. Co.....	173
Thompson v. Ketcham.....	321	Waggener v. Cheek.....	551
Thompson v. Lee Co.....	443	Wakefield v. Norton.....	631
Thompson v. Sanborn.....	126	Wakefield v. Newton.....	631
Thompson v. State.....	272	Walan v. Kerby.....	123
Thompson v. Wilson.....	106	Waldo v. Belcher.....	601
Thompson v. Whitman.....	274	Waldo v. Portland.....	440
Thorington v. Smith.....	556, 558	Walker v. Christian.....	557
Thornbrough v. Baker.....	678, 680	Walker v. Jackson.....	34
Thorne v. San Francisco.....	490	Walker & Fulton v. Board of Pub. W'ks,	165
Thurber v. Blackburne.....	110	Walker v. C. C. W. R. R.....	163
Thurston v. Puroval.....	686	Walker v. Walker.....	975
Tide Water Co. v. Coater.....	164	Wallenger v. Coutts.....	629
Tillotson v. McCrillis.....	196	Walton v. Fife.....	96
Tillotson v. Smith.....	156	Walther v. Warner.....	165, 169
Tinsman v. Belvidere Delaware R. R. Co.....	150, 160	Ward v. Aredondo.....	561
Tinicum Fishing Co. v. Carter.....	452	Ward v. Edmonds.....	548
Todd v. Daniel.....	548	Ward v. Jenkins.....	295
Todd v. Jackson.....	96	Ware v. Hylton.....	559
Todd v. Kerr.....	272	Warren v. Fitchburg Railroad Co.....	726
Todd v. Lee.....	493	Warren v. Buckminster.....	69
Toledo, etc. R. R. Co. v. Merriam.....	40	Washburn v. Merrills.....	675
		Watkins v. Lee.....	684
		Watkins v. Halstead.....	331, 339
		Watson v. Mercer.....	349

TABLE OF CASES CITED.

XXI

	PAGE.		PAGE.
Watson v. A. N. & B. Ry. Co.....	9	Willard v. Longstreet.....	490
Watson v. Poulson.....	43	Willink v. Vanderveer.....	43
Watson v. Watson.....	467	Williams v. Bank.....	543
Walter v. People.....	286, 291	Williams v. Cammack.....	439
W. B. & Susquehanna C. Co. v. Mulliner.....	185	Williams v. Hadley.....	130
Webber v. Great Western Ry. Co....	17	Williams v. N. Y. Cent. R. R.....	155, 165
Weber v. Lee Co.....	443	Williams v. Owen.....	679
Webster's Case.....	204	Williams v. Robbins.....	734, 735
Weed v. S. & S. R. Co.....	27	Williams v. Vanderbilt.....	84
Wedley v. State.....	245	Wilson v. Blodgett.....	542
Wellington v. Downer Kerosene Oil Co.,	683	Wilson v. Hamilton.....	495, 502
Wells, Ex parte.....	566	Wilson's Heirs v. Ins. Co.....	548
Wells v. Pierce.....	125	Wilson v. Mayor of New York.....	177
Weich v. Pittsburgh, Ft. Wayne etc.		Wilson v. Ray.....	631
R. R. Co.....	495	Wilson v. Webber.....	742
Wennall v. Adney.....	832	Wilson v. Wormal.....	608
Wendell v. Fleming.....	670	Winn v. Macon.....	439
Wendell v. Johnson.....	90, 103	Winslow v. Gifford.....	169
Wendell v. Mugridge.....	467	Winter v. Stevens.....	90, 96, 100
Wendell v. Van Benschelae.....	124	Winthrop v. Farrar.....	698
West v. Aurora City.....	548	Witta v. Stearns.....	615
Weston v. Charleston.....	551	Wood v. Gold.....	108
Wetumpka v. Winter.....	437, 439, 441	Wood v. Leadbitter.....	88
Wharf v. Howell.....	681	Woods v. Lawrence Co.....	439
Whitaker v. Perry.....	99	Wood v. Manley.....	87, 88
White v. Corporation of Yazoo City...	177	Wood v. Washburn.....	687
White v. Elwell.....	87	Woodbury v. Jones.....	79
White v. Franklin Bank.....	130	Woodhull v. Wagner.....	489
White v. Franklin.....	130	Woodruff v. Neal.....	164
White v. Green.....	629	Wooliam v. Hearn.....	680
White v. Hart.....	510, 511, 513, 515	Woolsey v. Bailey.....	141
White v. Herndon.....	347	Wormley v. Wormley.....	550
White v. Nicholls.....	740	Wright v. Defrees.....	235
White v. Sayre.....	223	Wright v. State.....	239
Whiteridge v. Taylor.....	659	Wright v. Willis.....	665
Whitesides v. Cannon.....	484	Wright v. Warren.....	615
Whitehouse, In re.....	13, 192	Wyman v. Babcock.....	677
Whitney v. Whitting.....	39	Wynehamer v. The People.....	151, 153
Whiting v. The Sheboygan R.R. Co.,	444, 456		
Whittaker v. Johnson Co.....	439	Yale v. Dederer.....	423, 426
Whittier v. Portl. and Ken. R. R.....	176	Yale v. Seely.....	93, 98
Whitworth v. Carter.....	328	Yates v. Milwaukee.....	155, 168
Wibert v. N. Y. & Erie Ry. Co.....	501	York Co. v. Central R. R. Co.....	379
Widolf v. Eve.....	541	York's Case.....	203
Wiggin v. Day.....	724	Yoter v. Banno.....	740
Wiggin v. Vesey.....	126, 128	Young v. Jeffries.....	623
Wilby v. W. C. R. Co.....	14		
Wilde v. Cantillon.....	98	Zabriskie v. Cleveland, etc., R. R. Co..	439
Wilcox v. Parmelee.....	28	Zell v. Ream.....	98
Wilkinson v. Coverdale.....	44	Zimmerman v. Union Canal Co.....	168
Willard v. Hammond.....	106		

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE.

GRAY v. JACKSON.

(51 N. H. 2.)

Common carrier — loss beyond line. Les loci.

Defendants, common carriers between P. and B., took a package at P. for R., a place in another State beyond their terminus. At B., the end of their line, according to custom they delivered it to another carrier and it was by him lost. *Held*, (1) that whether or not defendants undertook to carry the package beyond B. was a question of fact, and the judge who tried the facts having found that there was no such undertaking, a verdict for the defendant would not be set aside; (2) that if goods be lost *in transitu* from one State to another, the *lex loci* where the loss occurs governs the rights of the parties. (*See note, p. 40.*)

ACTION against defendants as common carriers for the loss of a package of \$41 received by them at Portsmouth, N. H., for Reading, Mass., and lost *in transitu*. The case was by consent of counsel tried by the court. The facts found were as follows:

Defendants are carriers between Portsmouth and Boston, but take packages for all parts of the country, which, when far beyond either terminus of their route, they turn over to other carriers for forwarding. Defendants received of plaintiff the package in question, directed to "Miss Nancy Thrasher, Reading, Mass.," and were

paid full charge for transportation the whole distance. Defendants gave plaintiff a receipt as follows:

"Jackson & Co., Portsmouth and Boston Express, Portsmouth, July 11, 1865. \$41.00. Received of Calvin Gray, package said to contain forty-one dollars, directed to Miss Nancy Thrasher, Reading, Mass., per Jackson & Co. Malden."

Reading was beyond defendants' line, but the plaintiff did not know it, and was not informed by defendants at the time, and he understood that defendants undertook to deliver the package as directed; defendants understood that they were to do no more than they subsequently did. There was no conversation upon this subject between the parties, but such the court found to be the understanding.

Defendants carried the package to the end of their route and delivered it over to another carrier with whom they had no business connection, paid for its transportation and took the carrier's receipt. The second carrier converted the package and contents to his own use. Before this action was brought a demand for the money was duly made of the defendants.

The court found a verdict for the defendants, to which the plaintiff excepted and moved for a new trial.

Minot, Tappan & Mugridge, for plaintiff.

C. P. Sanborn, for defendants.

DOX, J. "Whenever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him," says HOLT, C. J., in *Lane v. Cotton*, 12 Mod. 472, 484, where he names innkeepers and common carriers as engaged in public official duties. One who, in the language of Lord HOLT, "has made profession of a public employment," or "exercises a public employment" (*Coggs v. Bernard*, 2 Ld. Raym. 917), is bound to serve the public while he remains, or professes to remain, in that employment. The obligation of a common carrier of goods is "to receive and carry goods according to his public profession." *Johnson v. M. R. Co.*, 4 Exch. 367, 373.

The defendants have taken upon themselves the public office,

Gray v. Jackson.

trust, and duty of common carriers between Portsmouth and Boston, but not between Boston and Reading. They were under an obligation as common carriers to receive the plaintiff's parcel and carry it to Boston. That was their official duty. Assuming the office, they promise to perform its duties. This is common law. But it was no part of their official duty to carry the parcel to Reading, or to receive it coupled with a contract to carry it to Reading. And when the plaintiff accuses them of violating a contract to carry it to Reading, the plaintiff must prove the contract on which he relies. It is not proved by the official duty of their public employment, because that does not extend beyond Boston. A contract to carry the parcel to Reading must be a mutual understanding of the parties. It may be proved expressly or by implication, by direct or circumstantial evidence, by writing or parol, by words or conduct or usage. The understanding may be mutual, in contemplation of law, if the defendants are estopped to deny that it is mutual.

In *Hyde v. T. N. Co.*, 5 T. R. 389 (decided in 1793), the defendants, a navigation company, carried cotton to Manchester, where it was put in a warehouse, and burned the same night. In the bill, made out by the defendants and paid by the plaintiffs when the cotton was received by the defendants, was a charge for cartage, which was intended for the cartage to the defendants' warehouse in Manchester. Formerly the defendants employed their own carts, but had latterly given up this business, together with the profits derived from it, to their book-keeper; and the plaintiffs knew that the cartage was received for him. A verdict was found for the plaintiffs, and the defendants moved to set it aside. The only ground upon which the motion could be granted was that there was no evidence to sustain the verdict. The only question for the court was, whether there was any evidence from which the jury could have found the fact that the defendants undertook as common carriers to cart the cotton to the plaintiffs' warehouse, and the decision was in favor of the plaintiffs. Mr. Justice BULLER said: "It is like the case of an innkeeper, who agrees with his head ostler that the latter shall supply the customers with post-horses; in which case, if goods be lost, the innkeeper is liable, because he holds himself out to the public as the responsible person." All the judges held that the charge for cartage showed that the defendants undertook to deliver the cotton at the plaintiff's warehouse. Whether such an undertaking was shown by such a charge under the circum-

stances was a question of fact which the jury had decided; and the court could decide nothing more than this—that the charge was evidence from which the jury might properly have found the undertaking. But the court, in accordance with the English custom of the judge giving his opinion on the weight of the evidence, spoke of the evidence, not as tending to prove or competent to prove the fact, but as proving it.

Judge REDFIELD says, that in England, until a late period, the usage of inland common carriers was to employ their own porters to deliver parcels; that those who dealt with them acted upon the faith of their making a personal delivery; and that "*Hyde v. Tr. and M. Nav. Co.*, 5 T. R. 389, is decided upon this ground, and upon the additional fact that the carriers charged for cartage to the house of the consignee, thus showing that they so understood the contract." *F. & M. Bank v. C. T. Co.*, 23 Vt. 208, 209. In that view of the subject there are no legal elements except the common doctrine of estoppel and the general principle that a mutual understanding may be a contract. If the carrier and the consignor understand that the carrier undertakes to deliver a parcel at the town to which it is directed, or to the person to whom it is directed, or at his house or shop, the mutual understanding is the contract. The usage of making such delivery may be evidence tending to show the fact of an understanding that a particular parcel is to be delivered according to the usage. If the consignor had and the carrier had not such an understanding, the carrier's usage may be evidence tending to show the fact that he held himself out and practically represented himself as undertaking to do what he usually did; and if the consignor acted on the faith of such holding out and practical representation, the doctrine of estoppel may be applied. The carrier may be estopped to deny that he understood the contract to be what his conduct induces the consignor to understand it to be. And the usage of other carriers may tend to show the fact that the defendant, by carrying on their kind of business, held himself out as undertaking to carry goods according to the usage of his neighborhood; and an estoppel may be raised in that way.

In this view there is no law peculiar to this branch of the contract of a common carrier. There is no law in it, except the elementary and general principles applicable to all contracts, that a contract is a mutual understanding, and that a party may be

Gray v. Jackson.

estopped to deny that his understanding was such as he induced the other party to believe it to be. All the rest of the question, whether by an implied contract a carrier undertook to carry goods beyond his route, is a question of fact to be determined upon the evidence by the tribunal authorized to try the questions of fact involved in the issue.

How can so plain a question of fact be changed into a question of law? In *Muschamp v. L. & P. J. R. Co.*, 8 M. & W. 421 (decided in 1841, and everywhere accepted as the leading case on this subject), it was held to be a question of fact. A parcel directed to a place beyond the defendant's route, and carried by them through their route and forwarded, was afterward lost. Baron ROLFE "stated to the jury, in summing up, that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed; and that the same rule applied, although that place were beyond the limits within which he in general professed to carry on his trade of a carrier." The jury found a verdict for the plaintiff, and the defendants moved "for a new trial on the ground of misdirection."

"Lord ABINGER, C. B.—The simple question in this case is, whether the learned judge misdirected the jury in telling them that if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they were liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that in this proposition there was no misdirection. It is admitted by the defendants' counsel, that the defendants contract to do something more with the parcel than merely to carry it to Preston: they say the engagement is to carry it to Preston, and there to deliver it to an agent [of the plaintiff] who is to carry it further, who is afterward to be replaced by another, and so on until the end of the journey. * * * But if, as it is admitted on both sides, it is clear that something more was meant to be done by the defendants than carrying as far as Preston, it is not for the jury to say what is the contract, and *how much* more was undertaken to be done by them? Now, it certainly might be true that the contract

Gray v. Jackson.

between these parties was such as that suggested by the counsel for the defendants ; but other views of the case may be suggested quite as probable. * * * Is it not then a question for the jury to say what the nature of this contract was ; and is it not as reasonable an inference for them to draw, that the whole was one contract, as the contrary ? * * * Suppose the owner of goods sent under such circumstances, when he finds they do not come to hand, comes to the railway office and makes a complaint, then, if the defendants' argument in this case be well founded, if the railway company refuse to supply him with the name of the new agent, they break their contract. It is true that, practically, it might make no great difference to the proprietor of the goods which was the real contract, if their not immediately furnishing him with the name would entitle him to bring an action against *them*. But the question is, why should the jury infer one of these contracts rather than the other ? Which of the two is the most natural, the most usual, the most probable ? * * * The whole matter is therefore a question for the jury, to determine what the contract was on the evidence before them. * * *

"GURNEY, B. I think there was no misdirection in this case, and that the jury might fairly infer the contract was such as was stated by the learned judge."

In this explicit manner the undertaking of the carrier to be responsible for the delivery of the parcel beyond his own route was held to be a pure question of fact, to be determined by the jury on the evidence. There was such an undertaking, if both parties so understood it. Whether there was such an understanding, was plainly a question of fact, and no attempt was made to change it into a question of law. It was submitted to the jury by Baron ROLFE, and the only point decided by the court was, that it was a question of fact which must be submitted to the jury.

When Baron ROLFE told the jury that the evidence in the case was *prima facie* evidence of such an undertaking, by these words he held the undertaking to be a matter of fact to be proved by evidence. In saying that the evidence was *prima facie* evidence of the fact, he merely expressed his opinion of the weight of the evidence, in accordance with the general custom of English judges. *State v. Hodge*, 50 N. H. 519, 522, 525. In their practice, such opinions are given in various forms. Where we should say, "There is some evidence to be submitted to the jury," English

Gray v. Jackson.

judges often say, "The evidence proves," or, "The weight of the evidence is," or, "From the evidence the inference is," or "The presumption is," or, "This is *prima facie* evidence," or, "This evidence shifts the burden of proof," or, "This evidence is sufficient to prove the fact unless it is rebutted by the other party." And when exception is taken to such statements, the point intended to be raised by counsel and decided by the court is, not whether the judge may rightfully give the jury his opinion of the evidence in such forms (that is taken for granted), but whether there is any evidence for him to give his opinion of, and for the jury to give their verdict upon. *Muschamp v. L. & P. J. R. Co.* is an instance of this practice. The defendants contended that the evidence did not tend to prove an undertaking of the defendants to carry the parcel beyond their own route, but that it tended to prove a different undertaking, and that there was a misdirection in submitting the question to the jury instead of directing a verdict for the defendants, or ordering a nonsuit. If the defendants had admitted that there was evidence from which the jury might find an undertaking of the defendants to carry the parcel beyond their own route, and had contended that there was misdirection in the judge giving the jury his opinion of the *prima facie* weight of the evidence, their first difficulty would have been to convince the court that they were serious in raising an objection so apparently preposterous in Westminster Hall.

The opinions of English judges on the weight of the evidence being constantly given in such expressions as "From this evidence the inference [or presumption] is," or, "This is *prima facie* evidence," or other equivalent phrases, these expressions, having been used for ages in the trial of cases by jury, became the common judicial language used in delivering judgment on motions for new trials as well as in summing up to the jury. On the motion for a new trial, in *Muschamp v. L. & P. J. R. Co.*, Lord ABINGER, delivering judgment, said the undertaking alleged by the plaintiff "is the most likely contract under the circumstances." In saying this he no more undertook to state a rule of law than Mr. Justice BAYLEY did when he told the jury, in *King v. Diggles*, Wills Circ. Ev. 53, that "it was not very likely" that an old man would sell his spectacles. Lord ABINGER also incidentally remarked, "In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which, *prima facie*, must be made, of the defend-

ants having undertaken to carry the goods the whole way. Giving his opinion of the weight of the evidence, he declared the undertaking alleged by the plaintiff to be "the most likely contract under the circumstances," and he drew the inference of the fact that "the most likely contract" was, *prima facie*, the contract which the parties intended to make, and by a mutual understanding did make. All this he expressly held to be matter of fact and not matter of law. "The whole matter," says he, "is therefore a question for the jury, to determine what the contract was on the evidence before them."

But the decision in that case has often been misunderstood. It has been erroneously supposed that the opinions of ROLFE and ABINGER, on the *prima facie* weight of the evidence, were laid down as law. Through that error, the decision has been taken as the establishment of a peculiar legal principle fixing the liability of common carriers beyond their own routes, although it was held, with remarkable clearness and emphasis, that the whole matter was a question of fact for the jury. By such a mistake, and others of a similar kind, a plain question of fact may inadvertently be changed into a question of law.

The mistake in regard to the doctrine of Muschamp's case, on the point of *prima facie* evidence, was promoted, and another mistake was disseminated, by the reporters who made the head note of the case, by adding to a summary of the evidence this unfortunate statement: "*Held*, that the Lancaster and Preston Railway Company were liable for the loss." If they had said, "*Held*, by the jury, that the company were liable. *Held*, by the court, that there was evidence competent to be submitted to the jury," they would have made a correct and useful statement of the case. In Angell on Carriers, section 95, it is said that in Muschamp's case "it was held that the company were liable for the loss," from which the reader would understand that it was so held by the court.

It has been by no means an unusual thing for fact to be turned into law by the English practice of the judge giving the jury his opinion of the evidence. *State v. Pike*, 49 N. H. 438; *Lisbon v. Lyman*, id. 572; *State v. Hodge*, 50 id. 521. If the decision in Muschamp's case had always been carefully read with a full comprehension of that practice, and a clear perception of the distinction between law and fact which that practice tends to confound, the liability of carriers beyond their own routes would have avoided all

Gray v. Jackson.

the darkness, confusion, and conflict in which it has been involved. The simple solution of all the difficulties that have arisen on this subject is, not to hold fact to be law, and not to mistake the opinions of judges on the weight of evidence for opinions on principles of law.

The perplexity of some American authorities, growing out of a misapprehension of *Muschamp's* case, makes it necessary in examining all the authorities, English and American, to observe critically how the question arose in each particular case—whether it was submitted to the jury or any other tribunal as a question of fact, whether the real doctrine of *Muschamp's* case was understood, whether the attention of the court was called to the distinction between law and fact, and whether a single case can be found in which the court, having their attention expressly directly called to the distinction, or having the distinction clearly in mind, have held so plain a question of fact to be a question of law.

In *Watson v. A. N. & B. R. Co.*, 15 Jur. 448; S. C., 3 Eng. L. & Eq. 497 (decided in 1851), the defendants, by their station-master Chevins, received goods directed to Cardiff, a place beyond their line, which extended only as far as Nottingham. The plaintiff claimed damages for detention of the goods at Bristol, a place beyond the defendants' line, and delay in their arrival at Cardiff. The case was tried by the judge of a county court (without a jury), who awarded damages to the plaintiff. "The company now appealed against the decision, on two grounds: first, that they were not liable for the carriage beyond Nottingham." Opinions were delivered by Justices PATTESON and ERLE. The judge of the county court had found upon the evidence an undertaking of the defendants to carry the goods beyond their line, and there is nothing to show that he did not find the undertaking as a fact. PATTESON, J., commenced his opinion by saying, "We must take this case as it is stated, although we do not quite see what question is submitted to us." The question of the defendants' undertaking for carriage beyond their line being a question of fact, as held in *Muschamp's* case, and the judge of the county court having decided that question as he had authority to do, and the incompetency of evidence not being stated as a ground of appeal, it is not singular that the court were not quite able to see what question of law was submitted to them. Mr. Justice PATTESON further said, "If carriers receive a package to carry to a particular place, whether they themselves carry it all

the way, or not, they must be said to have the conveying of it to the end of the journey." That is a proposition about which there never was any doubt. Receiving "a package to carry to a particular place," means receiving it with an undertaking to carry it to that place; and a carrier, like other contractors, is bound to perform his undertaking. The judge of the county court, occupying the place of a jury, had found the undertaking, and on appeal the question was, whether there was any evidence tending to prove the undertaking. On which question Mr. Justice PATTESON said, "Chevins appears to have been the agent of the defendants; he receives the parcel to carry it to Cardiff, and makes out an invoice which the defendants have refused to produce. Now, putting these circumstances together, there is abundant evidence that they contracted to carry the package to Cardiff." Mr. Justice ERLE said, "The first question is, whether there is any evidence of the defendants' having contracted," and he expressed his opinion of the weight of the evidence in the usual English manner. This case is a mere confirmation of the doctrine of Muschamp's case, that the question of a carrier's undertaking to carry beyond his route is a question of fact, and the question whether there is any evidence tending to show such an undertaking is a question of law.

In consequence of carriers being liable to be held by juries on circumstantial evidence to have undertaken to carry beyond their own routes as in Muschamp's case, and apparently in consequence of the attention of carriers being called by that case to this liability, some of them took the precaution to insert in their way-bills, bills of lading, or receipt-notes, notices, conditions, or stipulations intended to protect them against such liability. And in *Fowles v. G. W. R. Co.*, 7 Exch. 699 (decided in 1852), it was held, upon a receipt-note signed by the plaintiff's agent and construed by the court as a written contract, that the defendants had not undertaken to carry beyond their route.

In *Schothorn v. S. S. R. Co.*, 8 Exch. 341 (decided in 1853), the defendants received, at the G. B. Station, packages directed to the E. I. Docks, London, and received the freight for the entire distance. By their practice, all goods received by them at the G. B. Station and directed to London were carried on their own line as far as Birmingham, and from thence forwarded to London by the L. & N. W. R. Co. The jury found that a clerk of the latter company had authority from the defendants to receive a countermand.

Gray v. Jackson.

which the plaintiff gave him, changing the direction of the packages to another point in London. The defendants' counsel seem to have been so well assured that the jury would find an undertaking to carry beyond their route, as the jury found in Muschamp's case, that they did not make any question on that point, but merely claimed that the clerk was not the defendants' agent to receive the countermand. ALDERSON, B., said, "There can be no doubt that the defendants made a contract to carry the plaintiff's goods the whole distance to London for certain reward for the entire journey; and there is also no doubt that they would have been liable for loss through their negligence in carrying during any part of that journey. Then the question arises, What was the contract between the parties? It really amounts to no more than a question of fact; and there is abundant evidence of a contract to deliver, as stated in the declaration, according to the plaintiff's directions, in London." In saying "there can be no doubt that the defendants made a contract to carry the plaintiff's goods the whole distance to London," he expressed a very strong opinion on the weight of the circumstantial evidence on a question which the defendants did not raise. They did not raise it, probably because they knew what the verdict would be upon it even if the jury were not aided by the opinion of the court on the weight of the evidence, and because they knew what the opinion of the court was on the weight of the evidence in such cases, and because they knew that that opinion would be given to the jury if they raised the question. It was manifestly useless for the defendants to raise the question, when the inclination of the jury against them would be so strongly reinforced by the opinion of the court on the weight of the evidence.

There is certainly nothing in this case in conflict with Muschamp's case; but the latter is confirmed by the question and answer of Baron ALDERSON, "What was the contract between the parties? It really amounts to no more than a question of fact."

In *Collins v. Bristol and Exeter Railway Co.*, 11 Exch. 790 (decided in Feb., 1856), the Great Western Railway Co., who were carriers from Bath to Bristol, received from the plaintiff a van-load of furniture to be conveyed to Torquay, a place beyond their line; and the plaintiff signed a receipt-note which contained a stipulation that the Great Western Railway Co. were not to be responsible for loss or damage arising from fire, and a stipulation that they were not to be responsible for any loss, damage, or detention that might

happen beyond the limits of their railway. The furniture was burned in the possession of the defendants, who were the next carriers beyond the Great Western Co. on the line toward Torquay. It was agreed at the trial that no advantage should be taken as to the action not having been brought against the proper carrier. The question was, whether any of the carriers on the entire line were responsible for the loss. The jury found there was no negligence on the part of the defendants, and the judge directed a verdict for the plaintiff. It was held by the court of exchequer (ALDERSON, B., delivering the opinion), that the contract for transportation from Bath to Torquay was one contract made by the plaintiff with the Great Western Co. alone; that the company contracted in express terms upon the face of the receipt-note to carry the goods from Bath to Torquay; that the stipulation as to fire protected them against loss from fire during the entire journey; that no action was maintainable against any of the companies; and that there should be a nonsuit. All this was a mere construction of the receipt-note held to be a written contract; and the decision is not authority on the question whether the finding, by inference and implication from circumstantial evidence, of an undertaking of a carrier to carry beyond his own route is a matter of law or a matter of fact.

In November, 1856, Collins' case was again decided, on appeal in the exchequer chamber. 1 H. & N. 517. It was there held that the true construction of the writing signed by the plaintiff was, that the Great Western Co. did not undertake to carry the goods to Torquay; that they were not to be responsible beyond their own railway; and that the stipulation as to loss by fire protected them alone—and the judgment of the court of exchequer was reversed. This decision, like the one reversed by it, being a construction given by the court to a paper held to be an express written contract, is not authority on the question whether the finding an undertaking by inference and implication from circumstantial evidence is a matter of law or a matter of fact.

In 1859, Collins' case went to the House of Lords on appeal. The judges were summoned, and asked whether the defendants were liable. BYLES, CROMPTON and WIGHTMAN answered in the affirmative, WATSON and MARTIN in the negative, and WILLIAMS replied that there was evidence to go to the jury on the question. BYLES, J., said, "There was but one signed document between the plaintiff below, the consignor, and the Great Western Railway Company—

Gray v. Jackson.

but that comprehends two contracts." WATSON, B., said, "I think there never was any contract with the defendants, but only one with the Great Western Railway Company. All this turns on the receipt-note, and the 10th condition indorsed thereon. * * * In the first case on this subject, *Muschamp v. The Lancaster Railway Company*, ROLFE, B., left it to the jury, as a matter of fact, whether, where goods were carried over continuous lines of railway belonging to several companies, there was a separate contract with each company, or one contract with the company of the first railway who received the goods; and it was found by the jury, and upheld by the court, to be one contract with the company who received the goods." CROMPTON, J., said, "This case appears to me to depend on the construction which is to be put upon the contract of carriage signed by the plaintiff below when he delivered the goods in question to the Great Western Railway Company. * * * The carrier in these cases is not bound to undertake to carry goods beyond his own line of railway: it must depend entirely on the contract whether he undertakes any duty after the goods have arrived at the place beyond which he does not carry. The contract in this case appears to me to be of this kind: the Great Western Railway Company being under no obligation in point of law to receive goods to be carried beyond their own line, say to the plaintiff — we will carry on the terms set forth in the receipt-note; and to these the plaintiff agrees." MARTIN, B., said, "The question mainly, although not entirely, depends upon the receipt-note; and in my opinion that note, with the facts, proves, not the contract which the plaintiff is bound to establish, but a very different one, viz.: a contract by the Great Western Railway Company to carry the goods from Bath to Torquay. * * * I give my opinion on the question proposed by your Lordships — not on the question whether, on the evidence at the trial, there was a case to go to the jury." WILLIAMS, J., said, "I understand the question proposed by your Lordships to be, in effect, whether there was any evidence to go to the jury that the defendants were liable. * * * To the question so understood, I reply in the affirmative.

The case was decided by Lords CHELMSFORD, CRANWORTH, WENSLEYDALE and KINGSDOWN. CHELMSFORD, Lord Chancellor, said, "If the true meaning of the 10th condition be what I have stated, then there is an express contract with the Great Western Railway Company for the conveyance of the goods from Bath to

Gray v. Jackson.

Torquay. * * * I think, therefore, that the contract was entire, was for the whole journey from Bath to Torquay, and was made with the Great Western Railway Company alone. * * * I may add, that my Lord BROUGHAM, who heard the whole of the argument, entirely agrees in this opinion." Lord CRANWORTH said, "The clear import of the receipt-note, taken by itself, is, that the company received the goods of Collins under an engagement to convey them to Torquay." Lord WENSLEYDALE said, "The contract on which this case depends is so ill penned that it is not surprising those who have to construe it should form different opinions upon its meaning. * * * On the whole, although I have felt considerable doubt in the course of the proceedings, I think the minority of the judges, who have given their opinions to your Lordships, are right." Lord KINGSDOWN said, "If the question was, as one or two of the judges in their opinions seem to consider, whether, the case having been properly left to the jury, there was evidence on which the jurors might find the verdict complained of, I should have had great difficulty in saying there was not. But the case depends upon the construction to be put on a written contract; and as to that, although not without some hesitation, I acquiesce in the view taken of it by my noble and learned friends." And the judgment of the court of exchequer chamber was reversed. This decision, like the former ones in the same case, is a mere construction of a paper held to be an express contract in writing; but there is much in the opinions of the judges and lords to show that the question whether the finding an undertaking by inference and implication from circumstantial evidence was regarded as a question of fact to be decided by the jury.

In *Wilby v. W. C. R. Co.*, 2 H. & N. 703 (decided in 1858), the defendants, whose railway extended from Penzance to Truro, received at Penzance goods addressed to a person at Wolverhampton "per first steamer from Hayle." The defendants safely carried the goods to Hayle, and delivered them to a steamer. The goods were damaged while in the possession of some carrier beyond the defendants' route. The case was submitted to the court upon an agreed statement of facts, the court "to be at liberty to draw any inference of fact which a jury might properly draw." POLLOCK, C. B. "The court being at liberty to draw the same inferences as a jury, we entertain no doubt as to what conclusion we ought to draw; though I should have been better satisfied if it had fallen to the province of

Gray v. Jackson.

a jury. However, we must decide a question of fact, viz.: whether there was evidence for a jury that the defendants undertook to carry the parcel the whole distance from Penzance to Wolverhampton, or whether they only undertook to carry it from Penzance to Hayle, and there place it on board a steam-packet, where their responsibility would end. * * * In this case, if I had been on the jury I should have had no hesitation in finding that the defendants undertook to carry the parcel from Penzance to Wolverhampton." WATSON, B. "I am of the same opinion. This is rather a question of fact than of law, and as to the fact I entertain no doubt. * * * In *Muschamp v. The Lancaster and Preston Railway Company*, 8 M. & W. 421, the question was properly left to the jury. * * * It is conceded that *Muschamp v. The Lancaster and Preston Railway Company* was well decided; but it is said that this case is distinguishable, because for a certain distance the sea intervenes. * * * There is nothing unreasonable, so as to lead to the conclusion that the company did not contract to carry by sea." CHANNELL, B., said, "I should have been more satisfied if the question had been submitted to a jury; but, since we have to decide it, I think that the defendant undertook to carry the whole distance. With respect to the argument that there was a special direction that the parcel should be sent by steamer from Hayle, that circumstance does not, in my opinion, alter the case. The question still is, whether the defendants' liability was that of common carriers. If they did not like to carry by steamer as directed, they were at liberty to reject the parcel; but they did not do so. As to the objection that the carriage by sea was *ultra vires*, I do not at present see any distinction between carrying by sea and carrying on the line of another person." And judgment was given for the plaintiff.

In *Mytton v. Midland Railway Company*, 4 H. & N. 615 (decided in 1859), the South Wales Railway Company were carriers from Newport to a point from which the Great Western Railway Company were carriers to Gloucester, and the defendants were carriers from Gloucester to Birmingham. The plaintiff bought of the South Wales Company at Newport a through ticket for Birmingham, and was carried over the three lines, but his baggage was lost by the defendants. By agreement of parties a verdict was entered for the plaintiff for £56, subject to a case in which the evidence was stated. MARTIN, B., delivering the opinion of the court, said, "Upon these facts the only question is, whether there was any

contract between the plaintiff and the Midland Railway Company, or whether the contract was not an entire contract with the South Wales Railway Company to convey the plaintiff the whole distance from Newport to Birmingham. We are of opinion that there was but one contract, and that that contract was with the South Wales Railway Company, and not with the Midland Railway Company. There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the Midland Railway Company to that contract, except that, by arrangement with the South Wales Railway Company, they conveyed on their line passengers booked from Newport to Birmingham. We think that the principle of *Muschamp v. The Preston and Lancaster Railway Company* applies to this case; and, as there was no contract with the Midland Railway Company, the plaintiff fails in this action, and the defendants are entitled to our judgment." And judgment was rendered for the defendants. The parties having referred the evidence to the court, the court found, upon the evidence, that the first carrier undertook to carry the plaintiff to Birmingham. The court declared that they followed *Muschamp's* case, in which the question was held to be and decided as a question of fact. About the same time WATSON, B., one of the judges who decided this case, giving his opinion in *Collins' case* to the House of Lords, particularly referred to *Muschamp's* case, and to the question being there left "to the jury as a matter of fact." And the year before the decision of *Mytton's case*, three of the judges who decided it, POLLOCK, WATSON and CHANNELL, delivering their opinions in *Wilby's case*, had asserted the question to be one of fact, and had decided it as such, no member of the court expressing any dissent or doubt. If the court had intended in *Mytton's case* to overturn their own decision made the year before in *Wilby's case*, if they had intended to hold that to be the law in 1859, which they had unanimously and explicitly held to be the fact in 1858, they would have avowed such a design, or have manifested it in an unmistakable manner. *Mytton's case*, therefore, must be classed with the cases in which the question of a carrier's undertaking to carry beyond his own route has been decided as a question of fact.

In *Coxon v. Great Western Railway Co.*, 5 H. & N. 274 (decided in 1860), the court held that, by a document construed by the court as a written contract, the first carrier undertook to carry beyond his own route.

Gray v. Jackson.

Great Western R. Co. v. Blake, 7 H. & N. 987 (1862), was tried before MARTIN, B., in 1860, when the following facts appeared. The defendants (the Great Western Railway Co.) contracted with passengers to carry them from Paddington to Milford, over their own railway from Paddington to Grange Court, and thence over the railway of the South Wales Railway Company to Milford. There was an arrangement between the two companies under which the two lines were worked, and the fares paid by passengers apportioned between them. The plaintiff (Blake) purchased the usual ticket from the defendants, and paid his fare, and became a passenger to be conveyed by the defendants from Paddington to Milford. Without any change of cars, he was injured on the South Wales line by a collision with an engine left on that line by the servants of the South Wales Railway Company. There was no negligence on the part of the driver of the train in which the plaintiff was carried. "The learned judge told the jury that the circumstance that the engine was left upon the line by the servants of the South Wales Railway Company, and not by the servants of the defendants, did not relieve the defendants from their legal liability, but that they were by law responsible for such negligent and improper act: whereupon the jury found a verdict for the plaintiff." The defendants, in pleading, denied that the plaintiff was "a passenger to be by the defendants safely or securely carried or conveyed on the said journey in the declaration mentioned." But they did not deny that they contracted to carry the plaintiff over the South Wales line to Milford. They probably knew that the jury, aided by the opinion of the court on the weight of the evidence, would find they did so contract. But they claimed that they were not responsible for the acts of the servants of the South Wales Railway Company, over whom they had no control. The Court of Exchequer Chamber held that, having contracted to carry the plaintiff to Milford over the line of another company, their responsibility was the same as if they had contracted to carry him all the way on a line of their own.

In *Webber v. Great Western R. Co.*, 3 H. & C. *771 (1865), BLACKBURN, J., left to the jury the question whether the defendants contracted with the plaintiff to convey his goods beyond their line, and the jury found for the plaintiff. During the argument of the defendants' motion for a new trial in the Court of Exchequer, BRAMWELL, B., said, "The question is, whether there was evidence

for the jury of a contract with the Great Western Railway Company to carry the whole distance from Worcester to Chester." POLLOCK, C. B., delivering the opinion of the court, said, "I am of opinion with the rest of the court, that there was evidence for the jury of one contract only, and not two contracts. The jury have so found, and we think there was evidence to warrant their finding."

These are the principal English cases usually cited on the question of a carrier's liability beyond his own route. They show that, in England, when there is no paper to be construed by the court as a contract in writing—when the undertaking of the carrier to carry beyond his own route is to be inferred or implied from circumstantial evidence—the question is one of fact. They also show that, upon the evidence usually introduced on that question of fact, the jury and the court habitually arrive at the same conclusion. When a carrier has made no stipulation and given no notice that he would not carry or be responsible beyond his own route, he is found, as a matter of fact, to have undertaken to carry to their destination goods directed to a place beyond his own route. Under peculiar circumstances, or in cases of directions to remote, unfrequented, unexplored, or inaccessible regions, a different undertaking would probably be found, and additional precedents made, demonstrating still more clearly the nature of the question as one of fact. But, in ordinary cases, the first carrier's undertaking being uniformly found to extend to the point of destination on any continuous line of transportation, his liability is practically the same as if it were fixed by a rule of law. And with a tendency to allow settled fact to grow into law, and in the absence of a universal habit of critically and inflexibly preserving the distinction between law and fact, it is not unlikely that the finding of the jury, recorded as the head-note in Muschamp's case, will eventually be regarded as the statement of a principle of English law.

In *Keys v. Railways*, 8 Irish Com. L. 167 (1858), it was held that there was evidence competent to be submitted to the jury on the question whether carriers, severally owning distinct parts of a line, contracted jointly to carry the plaintiff and his luggage over the entire line. MONAHAN, C. J., delivering the opinion, said that Muschamp's case "decided this proposition—that where one railway company sells a through ticket, and takes a parcel directed to a person far beyond the limits of its own line, the jury may find the existence of a contract by them to carry beyond their own line."

Gray v. Jackson.

After commenting on *Scothorn's* case, the same judge says of *Wilby's* case and other cases, "It is to be observed that, in this and other cases, no judge has decided the question of liability at all. They only decided that in each of those cases there was evidence to go to the jury of a contract for the entire journey by the company who sold the ticket; and that the jury and not the court were to say whether such contract was in fact entered into."

That case was confirmed in *Hayes v. S.W. R. Co.*, 9 Irish Com. L. 474 (1859), where it was also held that by the true construction of a certain written contract between two carriers, one of them was the agent of the other.

These authorities show that the English cases are rightly understood in Ireland.

In *Perkins v. P. S. & P. R. Co.*, 47 Me. 573 (decided in 1859), the defendants admitted themselves to be carriers from Portland to Boston. Their station agent at Biddeford signed a written contract purporting to bind them by an express promise to deliver the plaintiff's goods in Bloomington, Ill. The only question was the question of fact, whether the agent had authority to make such a contract. By agreement of parties, that question was submitted to the court upon evidence; and upon the evidence the court found that, as a matter of fact, the defendants were estopped to deny that the agent had such authority. In *Knight v. P. S. & P. R. Co.*, 56 Me. 234 (1868), the plaintiff purchased "a through ticket over three distinct lines of passenger transportation." The court said, "railroads may so issue their tickets and so conduct as to have the purchasers understand that they undertake for the whole route, in which case they will be held responsible to that extent." There is nothing in these cases having any tendency to show that, in the absence of an express written contract, a carrier's undertaking beyond his route is not a question of fact.

In *Crafts and wife v. British & American Express Co.* (tried by jury in Coös, November term, 1868), the defendants were carriers on the Grand Trunk Railway from West Milan to Northumberland. At West Milan they received goods directed to Mrs. Crafts at Newbury, Vt., a place not on their route, but to which goods might be sent by other carriers from Northumberland. A part of the goods arrived at Newbury, and a part were lost. The court (BELLows, J.) left the question of the defendants' undertaking to carry the goods beyond their route to the jury as a question of fact. "The court

instructed the jury that if the defendants through their agents received the goods at West Milan, directed to Mrs. Crafts at Newbury, Vt., and undertook to carry them there and deliver them to her, and they were lost, the defendants were liable, unless the loss was by the act of God or the public enemies; and they would be liable, even though they were lost on some stage route after they left Northumberland and while in the hands of another express company. That if the undertaking was made to deliver them to a stage line and another express company on the route to Newbury, and they did so, they would not be liable for a subsequent loss. But if they undertook to carry and deliver them at Newbury, they might employ such intermediate agents as carriers as they pleased, but their responsibility as carriers would continue the same after leaving the Grand Trunk Railway as while on that road; and that it was immaterial whether they had a general business connection with such intermediate agents or carriers or not, provided the undertaking to carry the goods to Newbury was shown." The only difference between this case and Muschamp's case is, that Baron ROLFE gave the jury his opinion of the weight of the evidence, and Judge BELLOWES did not. The jury in this case, without the aid of the judge's estimate of the evidence, concurred with the jury who tried Muschamp's case in finding a verdict for the plaintiffs; and at the adjourned law term at Manchester, August, 1869, judgment was ordered on the verdict by the whole court, PERLEY, C. J., delivering the opinion. The case was not reported because it was not regarded as establishing any new or settling any doubtful point, or as otherwise important to be published. Gen. Stats., ch. 200, § 3.

At the same adjourned law term, August, 1869, at Manchester, was decided *Nashua Lock Co. v. W. & N. R. Co.*, 48 N. H. 339, 2 Am. R. 242. That cause was submitted to the court on an agreed state of facts, and the court were unanimously of opinion that the plaintiffs were entitled to recover. PERLEY, C. J., said, "The contract between the plaintiffs and the defendants must be implied from the facts stated in the agreed case. * * * The general question is, whether the defendants undertook for the transportation of the goods through to New York, or only agreed to carry and deliver, or tender, them to the Norwich & Worcester Railroad. * * * The nature of the undertaking must be inferred from the facts stated in the agreed case." It is not expressly declared in the opinion that the defendants' undertaking was inferred as a matter of fact as dis-

Gray v. Jackson.

tinguished from a matter of law, but this point is made certain by BELLOWS, C. J., in *Barter & Co. v. Wheeler*, 49 N. H. 9, 27, 28; 6 Am. R. 434, where, in commenting upon *Nashua Lock Company v. W. & N. R. Co.*, he says, "in the case of a continuous line formed by several distinct companies, each operating a distinct part of the entire line, but each empowered to contract for freight over the whole route, and to receive pay for the whole distance, the receipts to be divided among the several companies in prescribed proportions, it would be competent for a jury to infer a joint contract by the several carriers to transport the goods over the entire route. It is quite well settled now that they have the capacity to make such joint contract, and we think that from the facts stated a jury might infer it." When a case is submitted to the court upon an agreed statement of facts, as *Nashua Lock Company v. Worcester and Nashua Railroad Company* was, the parties are supposed to intend that such facts may be found by implication from the facts agreed as a jury would be warranted in finding. That is the natural construction of an agreed case, in the absence of any express stipulation on the subject, and such is the construction given to agreed cases in this as well as in other jurisdictions. *Underhill v. Manchester*, 45 N. H. 214, 221.

In *Farmers and Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186, 208, 210, 212, 213 (1851), Judge REDFIELD says, "If the law fixes the extent of the contract in every instance, in the manner assumed, then most undoubtedly are the defendants liable in this case, unless they can show in the manner required some controlling usage. But if upon examination it shall appear that there is no rule of law applicable to the subject, and the extent of the transit is matter resting altogether in proof, then the course of business at the place of destination, the usage or practice of the defendants and other carriers, if any, at that port and at that wharf, become essential and controlling ingredients in the contract itself." Judge REDFIELD did not fail to see that Muschamp's case "considers it chiefly a matter of fact, to be determined by the jury as to the extent of the undertaking," by the expression "chiefly a matter of fact," taking into account the idea that the question was, of course, subject to the general and elementary rules of law upon which all contracts rest. Upon a thorough consideration of the subject, the learned judge sums up his own views and delivers the decision of the court thus: "All the cases, almost without exception, regard

the question of the time and place when the duty of the carrier ends as one of contract, to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carriers, the course of the business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties. The inquiry, then, in the present case, must come to this before the jury, whether it was reasonable for the plaintiffs, under the circumstances, to expect the defendants to do more than to deliver the parcel to the wharfinger. If not, then that was the contract, and that ended their responsibility, and the plaintiffs cannot complain of the defendants because the wharfinger was unfaithful. The defendants, unless they have, either expressly or by fair implication, undertaken on their part to do something more than deliver the parcel to the wharfinger, are no more liable for its loss than they would have been had it been lost upon ever so extensive a route of successive carriers, had it been intended to reach some remote destination in that mode. But if the plaintiffs can satisfy the jury that, from the circumstances attending the delivery or the course of the business, they were fairly justified in expecting the defendants to make a personal delivery at the bank, they must recover; otherwise, it seems to us the case is with the defendants."

The same judge, in his work on the Law of Railways, vol. 2, sec. 180, 3, says: "There are many cases where the American courts have held the carrier liable beyond the limits of his own route, upon the ground of a special undertaking, either express or implied; but whether any such contract exists is regarded as a matter to be determined from all the facts and attending circumstances of the case, and will more generally be an inference for the jury than the court, unless it depends upon the effect of written stipulations."

Morse v. Brainerd, 41 Vt. 550 (1869), was a proceeding in chancery tried by the court upon facts and testimony reported by a master. The defendants, as receivers operating the Vermont Central and Vermont and Canada railroads, received of the plaintiff, at Swanton, Vt., certain cattle directed to Medford, Mass. The cattle were transported safely over the Vermont railroads, but were injured on the lower and connecting roads. The court say: "The company is liable for injuries that occur beyond the termination of their own road only when they stipulate to deliver the property at a point beyond. * * * If, then, the defendants are to be made

Gray v. Jackson.

liable in this case, it must be upon the ground that they received the property in question under a contract, express or implied, to deliver it at Medford, its place of destination. Whether there was such a contract or not is mainly a question of fact, to be determined upon the master's report and the evidence referred to. That there was no express contract for the delivery of this property at Medford is conceded. Was there an implied contract to that effect?" After stating the facts showing a joint transportation line (such a one as in *Barter & Co. v. Wheeler*, 49 N. H. 9; 6 Am. R. 434, referred to in *Nashua Lock Co. v. W. and N. R. Co.*, 48 N. H. 361), the court proceeded thus: "These facts, and, in short, without stopping to enumerate further, the great mass of facts and testimony reported by the master are consistent, and many of them only consistent with the idea of an assumed liability to transport the property in this case from Swanton to Medford. Such, we think, must have been the understanding and expectation of Morse and the station agent at Swanton, at the time the property was put on to the defendant's road at that place." Sitting as a court of chancery, and inferring the fact from facts and evidence reported by the master, the court found the mutual understanding of the parties that the defendants were to be responsible beyond their own route.

Nutting v. C. R. R. Co., 1 Gray, 502 (1854), was submitted to the court upon an agreed statement of facts, from which the court did not infer the additional fact that the defendants undertook to carry beyond their own route. The defendants' liability, therefore, resting on the official duty of their public employment, did not extend beyond their own route, and the plaintiff did not recover. The opinions of the English judges in *Muschamp's case*, on the *prima facie* weight of the evidence, were mistaken for opinions of law, and the court said, "We cannot concur in that view of the law." The real difference was a non-concurrence in the English estimate of the weight of evidence. In this and some other cases, judges, speaking of a "special contract" or "a positive contract" of a carrier to carry beyond his own route, must be supposed to mean a contract proved by other evidence than the general duty of the carrier's public employment, and not an express contract as distinguished from an implied one. *Moses v. B. & M. R.*, 24 N. H. 84, 88.

"In *Fitchburg and Worcester Railroad v. Hanna*, 6 Gray, 539 (1856), the arrangement of the plaintiff was with another rail-

road and a steamboat company to and from New York. It appears that, in receiving goods at New York to be carried over the plaintiffs' line, the steamboat company acted as plaintiffs' agent. It followed, of course, that the plaintiffs could hold the whole freight, but were liable for damage done to the goods by the negligence of the steamboat company; and it was so held. But without such agency it would have been otherwise." *Darling v. B. & W. R. Co.*, 11 Allen, 297. Such agency, of course, may be found by a jury from slight circumstantial evidence.

In *Najac v. B. & L. R. Co.*, 7 Allen, 329 (1863), from an agreed statement of facts the court found the fact that the defendants undertook to carry the plaintiffs' baggage beyond their own route.

In *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189 (1864), the plaintiffs sent by the defendants, who were expressmen between Lowell and Boston, a coil of wire fence, directed to Annapolis, in Maryland, and gave them a bill for the price of the fence to collect from the person to whom the package was addressed. The defendants carried the package and bill to Boston, and, according to the usual course of business, delivered them to Adams & Co.'s Express, by whom they were carried to Annapolis, where Adams & Co. collected the bill and the charges for freight, but the money received on the bill was never paid over by Adams & Co. The case was tried by a jury, who found a verdict for the defendants; and the plaintiffs alleged exceptions, which were overruled. HOAR, J., delivering the opinion of the court, said, "The court instructed the jury 'that they were to determine what the contract between the plaintiffs was; that if the contract was to carry the fence to Boston and there deliver it to Adams & Co., then the defendants, upon safely carrying and delivering the fence to Adams & Co. at Boston, would thereby be discharged from all liability to the plaintiffs on account of said fence and the bill therefor from that time, and would not be liable for any loss or neglect on the part of Adams & Co., or for the amount of the bill, even if Adams & Co. had collected and held the money.' The correctness of this instruction is the question presented by the bill of exceptions. There was no express contract in relation to the transportation of the fence; and whether the implied contract was to carry it to Annapolis, or merely to carry it to Boston and forward it thence by the ordinary lines of transportation, was certainly a question for the jury upon the whole evidence in the case; in determining which, they would consider the

Gray v. Jackson.

nature of the business, the advertisements or notices given by the defendants, and all the circumstances tending to show the understanding of the parties. It was therefore properly left to the jury."

In *Darling v. Boston & Worcester Railroad Co.*, 11 Allen, 295 (1865), the defendants were "the carriers on the last line of transportation," and the injury done to the goods was done when they were in the possession of some other carrier, before they reached the defendants' line. The Michigan Central Railroad, the first carrier who received the goods, gave a receipt for them, which the court (construing it as an express written contract) declared was "so framed as to exclude the idea of joint responsibility with other carriers." And the court held there was no evidence tending to show any contract between the plaintiff and all the carriers jointly, and no evidence tending to show that the defendants were liable for damage done to the goods in the possession of some other carrier before they came to the defendants' line.

In *Gass v. N. Y. P. & B. R. Co.*, 99 Mass. 220 (1868), the plaintiffs claimed, as matter of law, that the defendants were liable for goods which were burned on a steamboat, and which never were in the defendants' possession, on the ground that the steamboat company were agents of the defendants or in partnership with them. The court held there was no evidence of such agency or partnership.

Burroughs v. N. & W. R. Co., 100 Mass. 26; 7 Am. R. 78, seems to have been submitted to the court upon an agreed statement of facts. The plaintiff's goods were destroyed on a steamboat in Long Island Sound by collision and fire, after they had been carried by the defendants to the end of their route. The plaintiff sought to charge the defendants as common carriers beyond the line of their railway, on three grounds. One was, that a station agent of the defendants had, by a written contract, expressly promised to deliver the goods in New York. But the court held that the facts were "clearly insufficient to warrant a court or jury in inferring that he had authority to bind the defendants as common carriers beyond the line of their own railroad." The plaintiffs also relied upon a written contract between the defendants and the steamboat company. But that contract expressly provided that each company should bear the losses happening on its own line. The plaintiffs also relied upon a "freight tariff" posted in the defendants' stations. But that expressly exempted the carriers from loss by collision or fire.

Gray v. Jackson.

And the court, apparently trying the case as a jury would try it, upon the evidence, gave judgment for the defendants.

In *Pendergast v. Adams Express Company*, 101 Mass. 120 (1869), there was a written contract which, as the court held, expressly limited the undertaking of the defendants to forwarding the parcel "to their agent nearest or most convenient to the destination, and then delivering it to other parties to complete the transportation." GRAY, J., delivering the opinion of the court, said, "When a common carrier is a corporation established for the purpose of transporting goods over a certain route, goods delivered to such corporation, directed to a more distant place, are presumed by our law to be received for the purpose of being carried by it over its own route only, and then forwarded by another carrier to their destination. *Burroughs v. Norwich & Worcester Railroad Co.*, 100 Mass. 26. When there is no charter to indicate the limits of the carrier's business, and no written agreement between him and the other party, the question what was in fact the extent of his undertaking is a question for the jury. *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189."

Hill Mng. Co. v. B. & L. R. Corporation, 104 Mass. 122; 6 Am. R. 202 (1870), was submitted to the court upon an agreed statement of facts, with an agreement that the court might draw any inferences from the competent facts stated that a jury would be justified in drawing. And from the facts agreed, the court drew the inference of fact that the defendants (a corporation) undertook for the carriage of the plaintiffs' goods beyond their own line.

The supreme court of Connecticut put a low estimate upon the weight of the evidence usually introduced by the plaintiff in this class of cases; and peculiar views prevail in that State concerning the power of a corporation to bind itself by a contract for carriage beyond the line on which it is specially authorized by its charter to assume the public office and perform the duties of a carrier. And the court of that State, acting upon their opinion of the weight of the evidence and their views of corporate power, set aside verdicts as against the evidence, and order nonsuits in cases in which courts, entertaining a different opinion of the weight of the evidence and different views of corporate power as affected by estoppel in contracts, would not adopt such a practice. *Hood v. N. Y. & N. H. R. Co.*, 22 Conn. 1; *Elmore v. N. R. Co.*, 23 id. 457; *Naugatuck R. Co. v. W. B. Co.*, 24 id. 468; *Converse v. N. & N. Y. T. Co.*, 33 id. 166

Gray v. Jackson.

In *Bostwick v. Champion*, 11 Wend. 571; S. C., 18 id. 175, the question was of the liability of the defendants as partners, not as common carriers. The action was not brought upon any duty, obligation or contract of a common carrier. The defendants were carriers on separate sections of a continuous line, with a community of interest in the profits of the entire line; and they were held to be partners. It has never been supposed that individuals engaged in the business of carriers were specially incapacitated to exercise the right of forming a partnership enjoyed by people in other kinds of business.

At the trial of *Weed v. S. & S. R. Co.*, 19 Wend. 534 (decided in 1838), the defendants moved for a nonsuit on the ground that they "had not the power to contract, and did not contract, to carry" the plaintiff's trunk beyond their own road. It does not appear that they had any desire to go to the jury on the question whether there was in fact a contract extending beyond their road, and it is not probable that they had any such desire, under the circumstances of that case. Their claim that they had made no such contract was apparently placed upon the sole ground that, as a matter of law, they had no corporate power to make it. COWEN, J., delivering the opinion of the court, began by saying, "The defendants, having undertaken to carry from the Springs to Albany, cannot now be received to say they were in truth carriers no farther than Schenectady, the termination of their own road."

At the trial of *St. John v. Van Santvoord*, 25 Wend. 660, it appeared that the defendants, owners of a line of tow-boats on the Hudson river between New York and Albany, received a box of goods marked for Little Falls, a place on a canal beyond Albany. The defendants carried the box to Albany and delivered it, according to the usage of business, to a canal boat plying between Albany and Little Falls. On the arrival of the canal boat at Little Falls, some of the goods were missing, and the box appeared to have been broken open. The plaintiffs objected to the evidence of usage, but it was received. The judge charged the jury that there was no evidence of any contract on the part of the defendants to carry the goods to Little Falls; that the known usage of the trade (not brought home to the plaintiffs) formed part of the contract between the parties; and that if the defendants delivered the goods at Albany according to usage and used ordinary diligence in procuring

Gray v. Jackson.

a safe conveyance and in forwarding the goods, they were entitled to a verdict. The jury found for the defendants, and judgment was rendered on the verdict.

This judgment was reversed by the supreme court (in 1841), on the ground that the judge erred in holding that, as matter of law, there was no evidence from which a contract could be implied to carry the goods beyond Albany. NELSON, C. J., giving his own opinion of the weight of the evidence, said it appeared to him that such a contract was fairly to be inferred from the evidence. The decision amounts to this: the contract was what the parties understood it to be, and there was evidence from which an understanding that the defendants were to carry the goods beyond their line might be inferred. In 1843 the judgment of the supreme court was reversed, and the judgment of the court of common pleas affirmed, by the court of errors, by a vote of eighteen to five. Chancellor WALWORTH said the only question was, whether the judge of the court of common pleas was right in receiving evidence of the usage, and in telling the jury that the defendants had discharged their duty if they had carried the goods safely to Albany and had forwarded them by a safe canal line from there, and declared he had no doubt the judge was right in both particulars. The chancellor put his opinion on the ground that the only material evidence was the mark on the box, and the usage, and that both parties must have understood that the defendants would transport the box to the place where their business as common carriers terminated, and send it on in the usual way as forwarders, from that place. PUTNAM, senator, who concurred with the chancellor, said that, from the evidence given at the trial, the jury had a right to assume that the box in question was delivered to the defendant to be transported according to the business of the line, and that it was the province of the jury to determine the effect and extent of the implied contract between the parties. PORTER, senator, dissented, on the ground that the question of an implied contract of the defendants to carry the goods beyond their line should have been left to the jury.

In the decision of this case, Muschamp's case (decided in 1841) was not referred to. *Van Santvord v. St. John*, 6 Hill, 157.

In *Wilcox v. Parmelee*, 3 Sandf. 610 (1850), the court said that, in Muschamp's case, "The defendants were held liable," and erroneously supposing that the defendants were held liable by the court,

Gray v. Jackson.

they seem to have adopted the verdict of an English jury as a rule of American law.

In *Hart v. R. & S. R. Co.*, 8 N. Y. 37 (1853), the defendants owned the last of several roads forming a line from Whitehall to Troy. The plaintiff purchased a through ticket at Whitehall, and passed over the entire line as a passenger, without change of car, and some of her baggage was lost. The court, in their opinion, use this language: "The court charged the jury that it was for them to say whether it was proved that the defendant, by its agents, received the baggage and agreed to carry it to Troy; and on the decision of the motion for a nonsuit, after all the evidence was given, the court stated it was a matter to be left to the jury. The court was right both in the charge and in the refusal to nonsuit. There were facts which it was proper to submit to the jury, who were the proper judges of the weight of evidence, and it would have been error to have refused so to submit them."

In *Wibert v. N. Y. & E. R. Co.*, 12 N. Y. 245 (1855), the question was of the defendants' liability for the detention of goods on their own road. HAND, J., in the course of a dissenting opinion, said that in some of the cases the corporation to whom property was first delivered was held liable for the default of other corporations, and that where a carrier was in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them there had been presumed.

In *Schroeder v. H. R. R. Co.*, 5 Duer, 55 (1855), it was found, by a judge deciding the facts as well as the law, that the defendants undertook to carry goods beyond their own line, and the question then was whether there was any evidence.

In *Hunt v. N. Y. & E. R. Co.*, 1 Hilton, 228 (1856), it was held that there was no evidence of the defendants' liability for damage done to goods before they received them.

In *Dillon v. N. Y. & E. R. Co.*, 1 Hilton, 231, it was held that there was no evidence of an undertaking of the defendants to carry beyond their own line.

In *Foy v. T. & B. R. Co.*, 24 Barb. 382 (1856), it was alleged in the plaintiff's complaint that the defendants contracted to carry a wagon from Troy to Burlington. "On the trial, the plaintiff proved the allegations in the complaint." No question was raised at the trial as to the defendants' liability beyond their own line. The only objections made to the plaintiff's right of recovery were, that there

Gray v. Jackson.

was no sale of the property, that the property never was demanded, and that there was no proof of negligence. In a *dictum*, HARRIS, J., expressed his opinion of the weight of the evidence tending to show a contract to deliver the wagon at Burlington, a place beyond the defendants' line.

In *Russell v. Livingston*, 16 N. Y. 515 (1858), the defendants carried from Amsterdam to Vienna a package directed to a person at Port Gibson (a place beyond their line), "Care of Dawley, Express Agent, Vienna." Dawley, the defendants' agent at Vienna, delivered the package to a stage running to Port Gibson, and it was lost. It was decided to be erroneous to rule, as matter of law, that Dawley received the package as plaintiffs' agent.

In *Quinby v. Vanderbilt*, 17 N. Y. 306 (1858), the question whether the defendant, a carrier from New York to Nicaragua, undertook to carry the plaintiff from New York by way of Nicaragua to San Francisco, was left to the jury, and it was held that there was evidence proper to be submitted to them.

Hempstead v. N. Y. C. R. Co., 28 Barb. 485 (1858), was tried by a judge without a jury, and the judge found that the defendants did not contract to carry beyond their own line, and this finding was not set aside.

In *Cury v. C. & T. R. Co.*, 29 Barb. 35 (1859), the defendants' line was from Toledo to Cleveland. The defendants, at Toledo, sold to Miss Bedel (the plaintiff's assignor) tickets for Buffalo. The defendants moved for a nonsuit on the ground that no contract was proved to carry beyond Cleveland. The motion was denied, and there was a verdict for the plaintiff. ALLEN, J., delivering the opinion of the court, said, "That there was no proof of a contract on the part of the defendant to carry the lady and her baggage beyond the termination of its road cannot be alleged. The proof was, that she applied to defendant's clerk and servant for a passage ticket by railroad from Toledo to Buffalo, and was furnished with tickets which carried her to Buffalo over the defendant's road and the other intermediate roads; and the defendant's clerk received the fare for the whole distance. Some contract was made by the defendant at that time; and if, upon the evidence, the defendant desired to make a question whether it was a contract for carriage by the defendant for the whole distance, or whether, in entering into the contract, the defendant represented and contracted for or in behalf of other corporations or individuals, as to a part of the

Gray v. Jackson.

distance, he was entitled to have such question passed upon by the jury; that is, if there was a doubt as to what the contract was, it was a proper question for the jury. But there was certainly evidence to carry the cause to the jury upon the question whether or not the defendant had contracted as alleged. * * * The court charged the jury * * * that the contract of the defendant was to deliver the trunk at Buffalo. * * * As the question relating to the discharge of the defendant from liability by the delivery of the trunk to the Painsville road depends entirely upon the terms of the contract and its validity, if for carriage of the passenger and her baggage east of Cleveland, the exceptions need not be further considered in this connection, except to repeat the remark before made that the defendant did not ask to have the jury decide what the contract in fact was. Had it done so, and the court had decided it as matter of law, it might perhaps have been error. The counsel did not object that the court, by passing upon the question, invaded upon the province of the jury, but the exception was based rather upon the ground that the defendant had not contracted because it could not lawfully contract for service beyond Cleveland. In *Muschamp v. The Lancaster and Preston Junction Railway Co.*, 8 M. & W. 421, in a case somewhat similar, it was treated by the court as a proper case for the jury to determine what the contract was, whether the railway company had undertaken to carry a parcel beyond the terminus of its road, or had agreed to carry it to its terminus and there deliver it to another carrier for transportation. The court held that they could not say that the latter was the import of the contract, as was asked by the defendant to be decided in this case. It was assumed by the defendant's counsel to be a proper question for the court, as there was no dispute about the evidence; and when a question is so treated, the party cannot, upon appeal, insist that it should have been submitted to the jury. *Barnes v. Perine*, 2 Kern. 18. If there was evidence upon which the jury might have found the contract as alleged by the plaintiff, rather than as claimed by the defendant, as a question of fact, the ruling and decision of the court will be sustained; in other words, there is no error for which the judgment will be reversed."

In *Chouteaux v. Leech*, 18 Penn. St. 224 (1852), the defendants were bound by a written contract. In *P. C. R. Co. v. Schwarzenberger*, 45 Penn. St. (9 Wright) 208, the carrier gave notice that it was not

liable beyond its own route, and therefore the plaintiff failed to prove a mutual understanding that the carrier would carry the plaintiff and his baggage beyond the carrier's own route. In *B. & P. S. Co. v. Brown*, 54 Penn. St. 77 (1867), the question was left to the jury. *Jenneson v. C. & A. R. & T. Co.* (Dist. Court, Phil.), 4 Am. L. Reg. 234, was governed by an express written contract. STROUD, J., upon an examination of the authorities, expressed the opinion that when the only evidence is the direction of goods by marks beyond the carrier's route, the carrier is only bound to transport and deliver them according to the usage of the business. In a note in this case, the editors of the Register say (p. 239), that the contract for carriage beyond the carrier's route "is in general a question of fact, and is to be determined by the finding of a jury."

In *Bradford v. S. C. R. Co.*, 7 Rich. 201, S. C. (1854), it was held to have been properly left to the jury to find the defendant liable as a joint carrier. In *Bradford & a. v. S. C. R. Co.*, 10 Rich. 221 (1857), it was held that there was no evidence that the defendant was liable as a joint carrier. In *Kyle v. L. R. Co.*, 10 Rich. 382, the defendants were bound by a written contract to deliver goods beyond their own line. *Bennett v. Filyaw*, 1 Flor. 403, does not relate to the responsibility of a carrier beyond his route.

In *R. R. Co. v. Sullivan & a.*, 25 Ga. 228 (1858), there was a written contract to deliver goods at Augusta, Ga., and it was held that the direction on them, "Cha't, So. Ca.," could not control the express undertaking.

In *Railroads, apts., v. Spratt*, 2 Duvall, 4 (1865), the appellants, being joint carriers with others, gave a through bill of lading for the transportation of goods from Louisville to New York, on which the jury found a verdict against them, and the verdict was not set aside.

In *Carter & a. v. Peck*, 4 Sneed, 203, Tenn. (1856), it was held (apparently as matter of law) that a carrier receiving, in advance, payment for transportation to a point beyond his route, thereby contracts to carry to that point.

In *U. S. Express Co. v. Rush & a.*, 24 Ind. 403, it was held to be the duty of a carrier to deliver goods, directed beyond his route, to the next carrier, according to the usual custom of business, and that in the written contract in that case there was no stipulation changing that duty.

In *Ill. C. R. Co. v. Copeland*, 24 Ill. 332, 337, 338 (1860), the court

Gray v. Jackson.

fell into the mistake of supposing that in Muschamp's case the defendants were held liable by the court as a matter of law; and upon that mistake the law of Illinois seems to be settled. *Ill. C. R. Co. v. Johnson*, 34 Ill. 389.

In *Candee v. P. R. Co.*, 21 Wis. 582, the supreme court of Wisconsin was disposed to follow *Ill. C. R. Co. v. Copeland*, 24 Ill. 332.

In *Pest v. C. & N. W. R. Co.*, 19 Wis. 118, it was held that the defendants were bound by a written contract to carry goods beyond their own line. In *D. & M. R. Co. v. F. & M. Bank*, 20 Wis. 122, it was held that by the true construction of a written contract the defendants were not responsible beyond their own line.

In *Angle & Co. v. M. & M. R. Co.*, 9 Iowa, 487, the opinions of English judges on the weight of the evidence were mistaken for opinions of law, and adopted as such.

These are some of the principal American cases usually cited on the question of the liability of a carrier beyond his own route, in the absence of an express written contract. Some of them are not in point. Many contain nothing but *dicta* on the subject. Some turn on writings held to be, or treated as, express contracts, the construction of which by the court shows the understanding of the parties, without the finding of a jury on parol or circumstantial evidence. Some are based on the mistake of supposing that in Muschamp's case the defendants were held liable by the court as a matter of law. Some are controlled or influenced by the mistake of supposing that in Muschamp's case the opinions of the judges on the *prima facie* weight of the evidence were opinions on the law. It would seem that in no one of them has the question been held to be, or been treated as, a question of law, where it was claimed to be a question of fact, or where the attention of the court was called to the distinction between law and fact, a distinction which has been clouded by misapprehensions of Muschamp's case. In nearly all of them, when there is no decisive contract in writing, it is held to be, or practically treated as a question of fact. There is much in the American authorities going strongly to show that Lord ABINGER was right, and there is nothing in them having any considerable tendency to show that he was wrong, when he said, in Muschamp's case, "The whole matter is, therefore, a question for the jury to determine what the contract was, on the evidence before them."

There are cases in which a carrier's liability depends upon the *terminus* of his route, the geographical extent of his public employ-

ment; where the question is to what point he has assumed the public duties of a common carrier, and how far he is required by his general public duty to carry goods under pain of an action against him. This is a question of fact. *Walker v. Jackson & a.*, 10 M. & W. 161; *Johnson v. M. R. Co.*, 4 Exch. 367; *Richards v. L. B. & S. C. R.*, 7 Com. B. 839; *Crouch v. L. & N. W. R. Co.*, 14 id. 255; *Williams v. Vanderbilt*, 29 Barb. 491. In some cases, the carrier's liability is considered in a manner tending to show that the question of his undertaking to carry beyond his route was not distinguished from the question of the extent of his route. The question whether the place to which goods are directed is beyond the carrier's route, and the question whether, if it is beyond his route, he undertook to carry the goods to it, may be contested in the same case; sometimes a single piece of evidence has a bearing on both of those questions; and there would often be an inconsistency in holding one of them to be a question of fact and the other a question of law.

In *Nashua Lock Co. v. W. & N. R. Co.*, 48 N. H. 339, 362, there is a statement of some of the consequences of holding, as matter of law, that, when goods are lost on some part of a continuous line of several associated carriers, the carrier on whose section of the line they were lost is alone liable. It is there said that it would often be difficult and sometimes impossible for the owner of the goods to learn where his loss happened; that he would have no means of learning himself, and would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the carriers; that if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man, and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy. The forlorn condition of the owner in such a case is put as an argument against holding, as matter of law, that the first carrier is not responsible beyond his own route.

On the other hand, in *Van Santford v. St. John*, 6 Hill, 157, 163, 170, there are statements of the consequences of holding as a matter of law, that a carrier is liable beyond his route. RHOADES, senator, says, "There are many men in this State who are engaged as common carriers in the transportation of the produce of the country by land. One of these men receives a load of

Gray v. Jackson.

flour on board his wagon for the purpose of delivering it at some point on the Erie canal, the barrels being marked and directed to a town in the interior of the State of Maine. The carrier neglects to make a special contract that his liability is to cease at the point of delivery on the canal; but he delivers the flour in good order on the canal, and the property is forwarded from one line of transportation to another, until it passes into the hands of the last carrier on the route, by whose want of care it is lost. It would under such circumstances be a most severe and harsh rule of law which should make the person who first undertook the transportation of the article liable for its loss. BOCKEE, senator, depicts the consequences of such a rule as "most alarming to all who are engaged in freighting and transportation." "Suppose," says he, "the box had been marked 'Brown's Hole, Rocky Mountains.'" If the law implies a contract to deliver the box at that place, he observes, as it is the duty of every man faithfully to fulfill his contracts, the carrier "must abandon his ordinary avocations and business, leave the delights of domestic association, embark with his dear-bought freight, and follow the long lines of internal navigation till he reaches the head waters of the Yellow Stone. Then he must traverse a vast desert, with Indian horses and pack-saddles, exposed to famine, to the wintry storms, to wild beasts and savages; and, if Providence should protect him through every danger, he returns, after years of suffering, a worn-out beggar to a ruined home."

All the weight of these arguments from consequences is against holding the question to be one of law. And they may be arguments proper to be addressed to a jury or other tribunal trying the fact of a case upon the question what the understanding of the parties was.

If the question in this case is of the mutual understanding of the parties, and if that question is one of fact, we are restrained by the constitution from holding it to be a question of law. *State v. Hodge*, 50 N. H. 522-525. The modern practice of trying common law cases by a judge without a jury, and the habit of inferring facts from an agreed statement of facts submitted to the court, and other influences besides those named in *State v. Hodge*, 50 N. H. 519-521, 525, may contribute to obscure the distinction between law and fact. But when the obscurity is penetrated, and a question is discerned to be a question of fact, no influence can induce the court to decide it as a question of law.

The principal argument for deciding the question in this case as one of law, is drawn from the convenience of a uniform and certain rule. No lack of such a rule has resulted in England from holding it to be a question of fact. The verdicts of English juries seem to be sufficiently settled and invariable to answer any reasonable demand on that score. And there would seem to be no cause to apprehend that any serious inconvenience will be experienced in this State from a want of uniformity and certainty in verdicts on questions of this kind. The subject cannot be justly subjected to an absolutely inflexible rule. "It might be consoling to the carriers and to others if we could lay down a rule of law somewhat more definite in this case. But from the almost infinite diversity of circumstances as to steamboat carriage, that is impossible. There will usually be, at every place, some fixed course of doing the business, which will be reasonable, or it would not be submitted to, and which will be easily ascertained on inquiry, and with reference to which contracts will be made, and which it is equally the interest and the duty of both parties to ascertain before they make contracts, and which it would be esteemed culpable negligence in any one not to ascertain, so far as was important to the correct understanding of contracts which he was making." *F. & M. Bank v. Champlain Trans. Co.*, 23 Vt. 213, 214.

And if, in ordinary classes of cases in which a fixed and uniform rule would be of great utility, there were danger that verdicts would be variable and uncertain, the danger might not be wholly obviated by holding the question to be one of law. It is said, in *Nashua Lock Co. v. W. & N. R. Co.*, 48 N. H. 346, 357, 363, that there is no little confusion and contradiction of authority respecting the liability of a carrier beyond his own route; that a review of the American cases shows but too plainly that if our courts have differed from the English, they are far from agreeing among themselves in any principle or doctrine that can be called the American rule; that there is not only much confusion, but no little conflict in the American authorities; and that the perplexing diversity of decision on this subject is such that there would seem to be no remedy unless the national legislature can provide one under the power given by the constitution to regulate commerce. If such is the condition of the authorities, it is proper to be considered in the choice of the tribunals by which the subject is to be settled and put at rest. If courts are now obliged to confess that their inability to establish a

Gray v. Jackson.

uniform rule by their own decisions has thrown the country into such confusion that the interposition of congress is necessary, this is not a favorable occasion for insisting that the need of uniformity requires the matter to be adjudicated by the court instead of the jury. And if the confusion of the authorities is much less than has been supposed, still an examination of them shows the juries have been more successful than courts in establishing a uniform system of rules on this subject.

One serious objection against the practice of turning fact into law is, that it introduces arbitrary rules and disorganizing exceptions into the scientific system of the law, overwhelms that reason which is the life of it (Co. Lit. 394 b.), and changes the law into a chaotic collection of fragmentary and incoherent regulations, to be mastered only by sheer force of a rare and marvelous memory.

But the constitutional view is the only one necessary to be considered, because it is conclusive. If trial by jury is as valuable as it seemed to the founders of our institutions, the danger of holding a matter of fact to be a matter of law outweighs the inconvenience of any uncertainty likely to be produced by verdicts of juries on the liability of carriers beyond their own routes. A single precedent of a matter of fact turned into law is a dangerous thing where precedent is authority. "One precedent creates another. They soon accumulate, and constitute law. What yesterday was fact, to-day is doctrine. Examples are supposed to justify the most dangerous measures, and where they do not suit exactly, the defect is supplied by analogy." If the court may invade the province of the jury at one point, they may invade it at all points. If they can appropriate a part of it, they can appropriate the whole, and, uniting the offices of judge and jury, which the constitution has divided, destroy the check and balance which have been deemed essential to the judicial branch of a free government. And, were it conceded that we are not now menaced by those governmental invasions of popular rights which our constitutional trial by jury was chiefly intended to defeat, we do not know to what danger future generations may be exposed, nor to what use a precedent, apparently harmless in itself, may hereafter be applied. Whether trial by jury is as valuable as it seemed to the founders of our institutions, is a question not to be debated before a tribunal sworn officially to support that trial as an institution established by the fundamental law.

Upon the question of the understanding of the parties in this

case, it may be doubtful whether the mere reception by the defendants of the parcel, directed to a place beyond their route, is evidence of an undertaking to carry the parcel to that place, or to be responsible for its carriage beyond Boston. It may be that they were bound to receive it, and to carry it to the end of their route, and to deliver it there to the next express, according to the usage of the business. If they were bound by the official duty of their public employment to receive it, how could their reception of it be evidence of a contract outside of and beyond their official duty? If their reception of it was within the reach and comprehension of their office, if they could not refuse to receive it and carry it to the next express at the end of their route under pain of an action against them, how could the performance of such a duty be evidence of a contract to perform more than that duty and to serve the plaintiff beyond their route? If the defendants had attempted to throw off a part of the official duty of their public employment between Portsmouth and Boston by a notice given to the plaintiff, there would be no presumption that the plaintiff had waived his legal right and made a contract to release them from a duty which he could require them to perform, or from a responsibility which he could require them to bear. *F. & M. Bank v. Champlain Trans. Co.*, 23 Vt. 205; *Moses v. B. & M. R. R.*, 24 N. H. 88, 89. There would be no presumption that he made a contract to relieve them from their obligation to serve him in any thing within the reach and comprehension of their office, which extends from Portsmouth to Boston. And how could a presumption be raised, from their rendering him service between Portsmouth and Boston, which they were bound to render, that they contracted to render him service beyond Boston, which they were not bound to render?

But if the plaintiff did not know that the defendants were carriers only as far as Boston, if he believed they were carriers to Reading, if he would not have delivered the package to them had he known they would deliver it to another carrier, and if there was any thing in their words or conduct intended to mislead the plaintiff, or which would have induced a man of ordinary care and prudence to entertain the plaintiff's belief and to act upon it, a case of estoppel might be made out. There might be a case in which a carrier's silence and omission to give notice of the extent of his route would be evidence tending to show, by way of estoppel, a mutual understanding that the carrier undertook to carry beyond his route.

Gray v. Jackson.

Upon the question of a mutual understanding in the absence of conclusive proof in writing, there would ordinarily be the direct testimony of the parties themselves. *Norris v. Morrill*, 40 N. H. 395; *Severance v. Carr*, 43 id. 65; *Graves v. Graves*, 45 id. 323; *Hale v. Taylor*, 45 id. 405; *Delano v. Goodwin*, 48 id. 203. The omission of either party to testify on that point might be evidence against him. *Lisbon v. Lyman*, 49 N. H. 568, 575, 580. What was said and done at the time the plaintiff delivered the package to the defendant might give some light on the question. The non-payment of freight in advance, or the prepayment of the whole as one charge or as several charges, might be competent. The usage of the defendant and other carriers might be important. If these defendants and the carrier beyond their route were partners in the through business between Portsmouth and Reading, or had an association or agreement among themselves in relation to it, their partnership or mutual agency might be material; and the absence of such partnership or agency might be material. *Burroughs & a. v. N. and W. R. Co.*, 100 Mass. 29, 30; *Hill Mng. Co. v. B. and L. R. Co.*, 104 Mass. 134. There might be a great variety both of direct and circumstantial evidence tending to show a mutual understanding, actual or constructive, effected in the minds of the parties by a real concurrence, or in contemplation of law by estoppel. No such mutual understanding, binding the defendants to carry the plaintiff's parcel beyond Boston, was found by the judge who tried the facts in this case.

The authorities on a carrier's liability beyond his own route seem not generally to put it upon the law of the State in which his contract is to be performed. Neither do they expressly make an exception to take this class of cases out of the general rule that the construction and force of a contract are governed by the law of the State in which it is to be executed. *Barter v. Wheeler*, 49 N. H. 29; 6 Am. R. 434; *Thayer v. Elliott*, 16 N. H. 102; *Whitney v. Whiting*, 35 id. 462; 2 Kent's Com. 459. If the part of the defendants' contract which was to be performed in Massachusetts is governed by the law of Massachusetts, the decisions of that State furnish no ground for granting a new trial in this case. If the defendants should to-morrow obtain one or more charters incorporating them as common carriers between Portsmouth and Boston, and they should, as a corporation, receive another parcel under the circumstances of this case, we cannot suppose that their responsi-

Gray v. Jackson.

bility would be held, as a matter of law, in Massachusetts, to be different from what it now is. The fact that by the terms of their charter they were carriers only between Portsmouth and Boston, might be evidence on the question whether they intended to undertake for carriage beyond Boston. It would seem that any presumption drawn from their charter as to their intention on that point would be an inference of fact and not of law. But the defendants not being a corporation, it seems to be expressly settled that, by the law of Massachusetts, the question whether they undertook to carry the plaintiff's parcel beyond Boston is a question of fact. The judge who tried the case found a general verdict for the defendants, and there must be

Judgment on the verdict.

NOTE. — In *Burroughs v. Norwich & Worcester R. R. Co.*, 1 Am. Rep. 78 (100 Mass. 26), it was held that a common carrier, receiving goods directed to a point beyond its line, is responsible beyond its own line only as a forwarder, unless it makes a positive agreement extending its liability; and that a station agent of such carrier is not authorized to extend such liability, without special authority from the carrier. It was also held that an agreement between two connecting carriers for a division of gross receipts for transportation on the through line, but providing that loss or damage to property on said line shall be borne by the party having possession at the time gives a right of action for loss or damage only against the carrier in fault. In *Cutts v. Brainard*, 1 Am. Rep. 353 (42 Vt. 566), goods were delivered to a common carrier, marked for a point beyond their line, and a receipt given therefor, wherein the carrier agreed "to forward by its railroad and deliver to — or order, at its depot in —," the consignee and place of deposit being left blank. The court held that the receipt constituted a special contract that the carrier would deliver the goods at the place of destination. In the *Nashua Lock Co. v. The Worcester & Nashua R. R. Co.*, 2 Am. Rep. 242, an agreement between a continuous line of common carriers to divide the price for through freight was held sufficient to render one of the carriers responsible for goods received by him for through carriage for any loss on any part of the connecting line.

But in the *Cincinnati, etc., R. R. Co. v. Pontius*, 2 Am. Rep. 391 (19 Ohio St. 221), an agreement between connecting lines for a division of through freight held not to render one carrier receiving goods to be carried through liable for a loss on the connecting line, where it was expressly stated in the bill of lading therefor, that the receiving carrier would transport them to the end of his line and then deliver them to the connecting line, and that in case of loss, the carrier having possession at the time of the loss should be alone liable. See *Toledo, etc., R. R. Co. v. Merriman*, 4 Am. Rep. 592 (52 Ill. 123), wherein a peculiar bill of lading was held to be a "through contract."

In *Milwaukee Cent. R. R. Co. v. Frankenberg*, 5 Am. Rep. 92 (54 Ill. 88), it was held by a divided court that where a common carrier receives goods marked for transportation beyond its line, it assumes the common-law liability for loss whether on its own line or on a connecting line, unless it specifically limit its liability to its own line, and the consignor have knowledge of such limitation. See, also, *Lamb v. Camden, etc., R. R. Co.*, 7 Am. Rep. 327 (49 N. Y. 271); *Barter v. Wheeler*, 6 Am. Rep. 434 (49 N. H. 9); *American Express Co. v. Second National Bank*, 8 Rep. 288 (60 Penn. St. 394). — REP.

Hammond v. Hussey.

HAMMOND V. HUSSEY.

(51 N. H. 40.)

Action — for malfeasance in performing voluntary service. Consideration.

Declaration that defendant, the teacher of a high school, was requested by the school committee, whose own duty it was, to examine candidates for admission to such school and report upon their qualifications, that he undertook the duty, that plaintiff was examined and found qualified, but that defendant falsely and maliciously reported against him and he was excluded from the benefits of the school. On demurrer *held*, (1) that the declaration was good; (2) that the confidence reposed in the defendant by the committee to examine candidates, and his acceptance of the trust, created sufficient legal consideration to make it a duty to faithfully perform the same.

ACTION brought by Charles B. Hammond against Thomas H. W. Hussey for damages sustained under the following facts: Defendant was principal and teacher of a high school at Nashua, N. H. He was requested by the school committee of the district to make an examination of the qualifications of certain scholars of the district with the view of ascertaining what scholars were qualified to be retained, and report truthfully thereon to the committee. April 13, 1869, the plaintiff, a scholar in said school, was examined, with a view of ascertaining his qualifications to be retained as a scholar in said school. Plaintiff alleges in his declaration that he was found qualified, but that defendant, "with the intent wrongfully to deprive him of the benefits of instruction in said school, and unjustly and unlawfully exclude him as a scholar therefrom, maliciously, deceitfully and falsely reported to the committee" against plaintiff's qualifications. The defendant entered a general demurrer to plaintiff's plea and the decision of the court is upon the same.

A. W. Sawyer, for defendant. The duty of examining scholars for admission having been imposed on the school committee, the latter could not delegate it, and the duty and responsibility rest alone upon them. *Moore v. Wilson*, 26 N. H. 332; *Powell v. Tuttle*, 3 N. Y. 396; *Downing v. Ruger*, 21 Wend. 178; *State v. Buffalo*, 9 Hill, 434. The law imposed no duty upon the defendant to examine scholars for admission, and he was therefore not liable for mis-

feassance or malfeasance in the discharge of an official or legal duty. *Mayor of Albany v. Cunliff*, 2 N. Y. 165; *Buller's N. P. or Cr. El.* 219. The plaintiff's proper course was an appeal to the committee. *Sherman v. Charlestown*, 8 Cush. 160. To the point that an action does not lie where the law imposes no duty, counsel cited the following authorities: 1 *Bacon's Abr.*, tit. Action on Cases; *Balfe v. West*, 13 Com. B. 466; *Stone v. Cartwright*, 6 T. R. 411; *Platt v. Potts*, 13 Ired. 455; *Matthews v. Pass*, 19 Geo. 141; *Johnson v. Hitchcock*, 15 Johns. 185; *Spear v. Cummings*, 23 Pick. 224; *Harvey v. Bush*, 2 Penning. (N. J.) 975. The act not amounting to a legal injury, the bad intent cannot make it actionable. *Stevenson v. Newnham*, 13 Com. B. 285; *Auburn v. Douglass*, 9 N. Y. 444; *Keith v. Howard*, 24 Pick. 292.

Geo. Y. Sawyer and Sawyer, Jr.; Barrett & Atherton and Morrison & Stanley, for plaintiff.

FOSTER, J. The substance of the plaintiff's declaration is that the school committee employed the defendant to examine candidates for admission to the high school, and to report upon their qualifications; that the defendant voluntarily undertook to make such examination; that he examined the plaintiff, and found him to possess the requisite qualifications; but, with intent wrongfully to exclude the plaintiff from the school and to deprive him of its benefits, maliciously and falsely reported to the committee that he was not qualified; and, by reason of this malicious and false representation, the plaintiff was excluded from the school and lost its benefits.

The declaration, therefore, charges upon the defendant a willful and positive deceit and fraud; and the suit is placed upon the general ground that, where one party sustains an injury by the malfeasance of another, the sufferer may maintain an action against the wrong-doer for redress.

The defendant contends that upon this declaration no suit can be maintained; because, assuming the allegations to be true, there is no contract, express or implied, between these parties, and without privity of contract there can be no liability.

It is true that there was no express contract between the parties, and that the defendant acted in the performance of no public duty nor of any obligation to the plaintiff. It is also true that the plain-

Hammond v. Hussey.

tiff was under no obligation to submit himself to the defendant for examination.

But the plaintiff contends that notwithstanding the acts of both parties were voluntary, still the undertaking of the defendant to examine the plaintiff, and the plaintiff's submission of himself to that examination, created and established between them a contract, by implication of law; and that, such being the case, the defendant was under obligation, notwithstanding his work was gratuitous, to perform his undertaking with ordinary care and diligence—to make examination of the plaintiff in good faith, and truthfully to report the result to the committee.

It may be doubted whether these considerations necessarily enter into the present inquiry. The case does not rest upon a charge of negligence nor of misfeasance at all, nor even of malfeasance in the performance of any duty imposed by law or required by the terms of a contract; but the declaration charges a positive and willful false representation, deceit and fraud, whereby the plaintiff received damage. It is of the character of a declaration in slander, and would seem to be governed by the principles applicable to such a case.

And although it may be said that the voluntary relationship which the parties assumed placed them in privity of contract, so that for negligence in the performance of the defendant's undertaking, *a fortiori*, for fraud concerning it, he would be liable, in damages, in this action, still, it may be seriously questioned whether the alleged fraud and deceit, though perhaps connected with contract by implication of law, is necessarily affected by or at all dependent upon the existence of such contract.

What difference does it make whether the defendant, in the perpetration of a malicious fraud and falsehood, such as the demurrer admits, violated an express or an implied contract, or any duty resulting from his relation either to the plaintiff or to the school committee; or, whether as a mere stranger, in law, he achieved the wrong and caused the damage? Does not the simple and general rule apply, that, where a party sustains an injury by the willful wrong of another, the sufferer may have his action against the wrong-doer? See *Mayor of Albany v. Cunliff*, 2 N. Y. 180; *Pasley v. Freeman*, 3 Term, 51; S. C., 2 Smith's L. C. 137, 138; *Wilkin v. Vanderveer*, 1 Barb. 599; *Watson v. Poulson*, 7 Eng. L. & Eq. 585; *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

But without placing the decision of the questions before us upon these grounds, we have no difficulty nor hesitation in disposing of them by the application of the principles so well settled in *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith's L. C. *284.

As all lawyers know, it was there held that "if a man undertakes to carry goods safely and securely he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage."

The analogy is obvious, and the principle evolved, and by the application of which this case is to be determined, is that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. Notes to 1 Smith's L. C. *293; *Wilkinson v. Coverdale*, 1 Esp. N. P. Rep. 74; *Doorman v. Jenkins*, 2 Ad. & E. 256; 1 Pars. Con. (5th ed.) 447, and note *u*.

By this rule, a gratuitous and voluntary agent, who has no public or official duty to perform, but who, nevertheless, undertakes gratuitously to do a particular service requiring the trust and confidence of another, though the degree of his responsibility is greatly inferior to that of a hired agent, is yet bound not to be guilty of gross negligence.

Prof. Parsons expresses the rule in more broad and general terms, thus: "If a person makes a gratuitous promise, and then enters upon the performance of it, he is held to a full execution of all he has undertaken."

It is unnecessary to indorse so general a proposition without qualification or limitation; but it is sufficient to hold that if a voluntary agent, without compensation, is accountable for the consequences of his gross negligence, much more should he be held answerable for willful and malicious fraud and wrong in connection with his assumed undertaking,

Questions involving the principle under consideration seldom arise except in the case of bailments, but the principle is broad enough to include the subject of the present inquiry.

The demurrer is overruled.

DAYLIGHT BURNER CO. v. ODLIN.

(51 N. H. 55.)

Agency — effect of limitation as to third parties.

An agent had authority to sell goods on commission for his principal; but no authority to sell otherwise than for cash. He did sell on credit and the goods were sent marked C. O. D. The carrier delivered the goods without receiving the cash on the written order of the agent. *Held*, that the carrier who knew of the authority of the agent to sell was not affected by the limitation of which he had no notice, and that the mark C. O. D. did not put him on inquiry as a matter of law, but was a question to be determined by the jury.

ACTION brought by plaintiff, a corporation of New York city, against defendant, a common carrier between Boston and Exeter, for delivering goods marked C. O. D. without being paid for the same. The goods were consigned to one Berry, who bought them on a credit of one Moore a traveling merchant empowered to sell goods for plaintiff on commission. Berry refused to receive the goods, C. O. D., and defendant refused to deliver them without payment. Berry then produced a written order from Moore to defendant to deliver the goods, "without C. O. D.," which defendant recognized and obeyed. Plaintiff proved that Moore had no interest in its corporation or goods, and had no authority to sell on any other terms than "cash on delivery;" that he had no authority to give the order for their delivery without the cash, and that the order he did give was given without plaintiff's knowledge. The court instructed the jury that the marking of the goods in question C. O. D. was a fact for them to take into consideration in determining notice to defendant of Moore's limited authority, and that it was for them to say whether it was sufficient to put the defendant on inquiry.

A verdict was found for the defendant, which plaintiff's counsel moved to set aside.

Mr. Wood, for plaintiff, cited *Story on Agency*, § 127; *Howard v. Braithwaite*, 1 Ves. & B. 209; *Stainer v. Tyssen*, 3 Hill, 279; *Barnard v. Wheeler*, 24 Me. 412; as establishing the point that Moore could not vary the contract between plaintiff and defendant for

cash on delivery; and *Towle v. Lervitt*, 23 N. H. 373; *Cameron v. Little*, 13 id. 26; and 3 U. S. Dig. 62, § 17, upon the point of notice of the limitation of Moore's authority contained in the term C. O. D., at least sufficient to put defendant on inquiry.

Mr. Marston, for defendant.

BELLOWS, C. J. From the uncontradicted testimony of the plaintiff and the finding of the jury, it may be assumed that Moore was clothed by the plaintiff with an apparent authority, like that of a factor, to sell all the goods of the plaintiff he could sell within his business circuit, on a commission of ten per cent.

As incident to that general authority, he had power to fix the terms of sale, including the time, place and mode of delivery, and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject, of course, to be controlled by proof of the mercantile usage in such trade or business.

There is some conflict in the adjudged cases upon the question of the authority of a factor to sell on credit, but we think the weight of modern authority is in favor of the position that he may sell on credit, unless a contrary usage is shown. *Goodenow v. Tyler*, 7 Mass. 36; *Hapgood v. Batcheller*, 4 Metc. 576; *Greely v. Bartlett*, 1 Greenl. 178; *Van Alen v. Vanderpool*, 6 Johns. 70; *Robertson v. Livingston*, 5 Cow. 473; *Leland v. Douglass*, 1 Wend. 490; and see 1 Am. Lead. Cas. (4th ed.) 662, note, where it is said that it is universally established as the law-merchant that a factor may sell on credit. So is *Laussatt v. Lippincott*, 6 S. & R. 386, and *May v. Mitchell*, 5 Humph. 365, and Story on Agency, § 209.

The same views are recognized in *Scott v. Surman*, Willes, 406; *Russell v. Hankey*, 6 T. R. 12; *Houghton v. Matthews*, 3 B. & P. 489, per CHAMBRE, J.; 3 Selw. N. P. 719.

In the case before us, Moore stands much on the same footing as a factor. The most marked distinction is, that he is a traveling merchant, and did not apparently have his principal's goods with him; but this, we think, cannot affect the rule.

The reason of that rule in the case of factors is, that it is found, by experience and repeated proofs in courts of justice, that it is ordinarily the usage of factors to sell on credit; and the same reason will apply in this case.

We have a case, then, where the agent was apparently clothed

Daylight Burner Co. v. Odlin.

with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit as he might think proper ; and this being so, Moore must be regarded, in respect to third persons, as the plaintiff's general agent, whose authority would not be limited by instructions not brought to the notice of such third persons. *Backman v. Charlestown*, 42 N. H. 125, and cases cited.

As Moore, then, in respect to third persons, had the power to sell on credit, the authority to control the delivery of the goods so sold and sent to his order, for the purpose of making it conform to the contract of sale, would necessarily come within the scope of his agency ; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the agent's want of authority. As to him the agent's apparent authority was real authority.

The marking of the package by another agent of the plaintiff, to the effect that cash was required on delivery, was not in law notice of such want of authority, although it might be sufficient to put the defendant upon inquiry. That, however, was properly left to the jury, and they have found it not to be sufficient for that purpose. The marking of the package in that way does not necessarily imply that the agent had no authority to sell on credit, but it might indicate merely that the person so marking it supposed the sale to be for cash. And it might well be considered to come within the scope of Moore's agency to make the delivery conform to the contract of sale.

As the defendant, therefore, is found to have had no notice of any want of authority in Moore, and was not put upon inquiry, there must be

Judgment on the verdict.

JENNESS V. WENDELL.

(41 N. H. 68.)

Statute of frauds. Auction — entirety of contract on separate bids.

At an auction sale of hotel furniture and stable stock connected with the hotel at the same time and upon the same terms and conditions, part of which were cash on delivery had by plaintiff, defendant made separate purchases at various prices and under different bids; a number of which were under \$33, but all amounting in the aggregate to a sum exceeding \$33. The stable stock was taken away by defendant at the time of sale and afterward paid for by him. The remainder of the articles, which were carpets, were left in the hotel by consent of plaintiff and defendant, and were subsequently destroyed with the hotel by fire. In an action to recover the amount of defendant's bids, it was *held* that the contract of sale was an entirety and, therefore, within the statute of frauds, but that the delivery of the stable stock carried the transaction without the operation of the statute.

ACTION on account for goods sold and delivered in which the declaration was afterward amended under objection by adding a count of goods bargained and sold. On the 3d, 4th and 5th of June, 1862, by an auctioneer, the hotel furniture of the plaintiff and stable stock connected with the hotel were sold at public auction at Rye Beach. The terms of the sale were cash on delivery. Defendant bid off the stable stock to the amount of \$163.50, and took it, and after the commencement of this suit paid for it. The furniture (except \$3.50 worth), consisting of carpets, was at the same sale bid off by defendant to the amount of \$196.12 in lots of less than \$15 each. By consent of parties the carpets were left on the floors of the hotel, and on June 22, 1863, the hotel and carpets were destroyed by fire. The question was, could plaintiff recover the \$196.12 (less \$3.50) bid by defendant for the carpets. The case was tried by the court on consent of counsel.

W. H. Y. Hackett, for plaintiff.

Mr. Hatch, for defendant.

ARGENT, J. It seems to have been *questio vexata*, when an estate was sold by auction in separate lots, and the same person

became the purchaser of several lots, whether a distinct contract arose as to each, or whether there was but one contract as to the whole. But the better opinion appears to be, at least *at law*, that a distinct contract is created as to each lot,—though it would be otherwise when a written contract is afterward entered into and signed for the purchase of several lots at an aggregate price. *Chitty* on Cont. 298; *Johnson v. Johnson*, 3 B. & P. 169; *Roots v. Lord Dormer*, 4 B. & Ad. 77; *Poole v. Shergold*, 2 Bro. Ch. 119; *Seaton v. Booth*, 4 Ad. & E. 528.

In *Dykes v. Blake*, 4 Bing. (N. C.) 463, two lots of land were sold at auction separately to the same person, but at the close of the sale one agreement was entered into for the sale of both lots at the aggregate price. *Held*, that a material misdescription of one lot would entitle the purchaser to rescind the contract as to both.

In *Van Eps v. Schenectady*, 12 Johns. 436, plaintiff had purchased thirty-three lots of land at auction, at as many separate sales, on the same day, paying a distinct and separate price for each lot, and took thirty-three separate certificates, one of each lot; and the plaintiff having paid for all his lots, and the defendant not being able to make good title to three of the lots,—*held*, that this was not an entire contract, and that the vendee could not rescind the contract *in toto*, but must take a conveyance of such lots as defendant could convey with good title, and might recover back with interest the money paid upon the lots to which defendant could give no title. *Held*, also, that the vendor was obliged to give separate deeds of the several lots, if required, and his offer to execute one deed for the whole did not render the contract entire.

From these last two cases it would seem that the contract will be considered to be entire for several lots, or separate for each lot, much more according to the circumstances of each case and the way the business was finally closed up between the parties, and upon their understanding and intentions in relation to the trade, than upon the fact that the lots were sold at auction, and struck off to the same party at one or at several bids.

Chitty applies the same rule to personal property, which he lays down in relation to real estate, viz., that in a sale of goods *by auction*, if several lots be put up separately and separately knocked down to the same person, and on each occasion the auctioneer writes down the vendee's name, there is in point of law a distinct and independent contract as to each lot, although the purchaser

afterward sign one memorandum that he has bought *the several lots*; though it would be otherwise if the memorandum were for the purchase of the several lots at an *aggregate* price. Chitty on Cont. 383, 404. But it will be observed that he places much stress upon the fact that the sale was *by auction*, where the auctioneer is so far the agent of both parties that he may bind them by signing their names to the contract.

But in this country, where household furniture, farming tools, and such like articles about a farm or a hotel are sold, or where the sale also includes the stable stock, as in this case, or the farm stock and produce, we think there is ordinarily very little difference in fact between sales at an auction and a sale at any other place, or contracted in any other way, of several articles at an agreed price, which are all put together in one account.

When the question is as to there being such a memorandum in writing of the sale, signed by the parties or their agents, as will make it a valid sale under the statute of frauds, it often becomes material to consider whether the sale was by auction or otherwise. See Brown on Stat. of Frauds, §§ 347, 369, where the cases are mentioned in which the same person may be the agent of both parties — as the broker, with his bought and sold notes and written book of entries; the auctioneer who, when he sells the property of one, and knocks it down to the highest bidder, becomes the agent of the bidder, as he was previously that of the seller, to conclude the contract, and does conclude it by entering the buyer's name as such in his sales-book, which contains the substance of the contract. In the last section, he adds: "This rule applies equally to public officers not professedly auctioneers, but selling property at public auction, such as sheriffs and their deputies, administrators, commissioners acting under order of court, land commissioners," etc., * * * "but would not extend to a mere private agent of the vendor, assuming to sell property at auction; nor is a commission merchant regarded either as an auctioneer or broker, so as to enable him to bind the purchaser of goods by a memorandum."

The same author, in section 335, says: "In considering the question, when the price of the goods sold was held to amount to the sum fixed by the statute, we saw that the prices of a number of articles, each less than that sum, but in the aggregate exceeding it, were to be taken together so as to bring the contract within the statute, if the purchases were all made at the same time, or so con-

Jenness v. Wendell.

nected as to show the transaction to be one and the same; and in like manner, the acceptance and receipt of one or a part of one of such parcels in a combined purchase is sufficient to perfect the contract as to the whole. It may often be a matter of difficulty to determine whether the transaction was one and the same. In the common case of a number of articles purchased at private sale of a shopman, for instance, at the same time, though at separate prices, it is clear that the aggregate is to be taken as the purchase. The same has been held as to the aggregate of various purchases made by a party at an auction, and also in a case where the parties had met by appointment for the purchase of timber, and had proceeded together to several places some miles apart, making bargains for timber at each place, at separate prices, but all on the same day. In each of the instances referred to, there was a memorandum or bill of the whole made out and presented, and assented to by the buyer, to which fact much weight was allowed, as showing that the parties regarded the transaction as one and entire."

In the case before us, nothing is said of the memorandum which was made at the sale, if any was made, and therefore no presumptions are to be made concerning it. The questions raised are, whether these parcels of furniture, that were bid off separately, are to be treated as constituting so many separate and distinct contracts and sales, or whether the whole transaction constituted but one sale, *an entire contract*.

Mills v. Hunt, 17 Wend. 333, is a case strongly in point. In that case no question was raised concerning the memorandum of the sale, but simply whether each bid at an auction by the same party, at which a lot of goods is knocked down, constitutes a separate and distinct contract and sale, or whether they altogether constitute one entire contract; and if the latter, then whether there had been such a partial delivery of the goods as to take the case out of the operation of the statute of frauds. In that case it was held that, though the articles were purchased at an auction sale and were numerous, and were struck off separately at separate and distinct prices, yet that the whole constituted but one entire contract, and that a delivery of a part of the goods sold renders the sale valid, as to the whole, within the statute of frauds. The doctrine of that case was confirmed in the court of errors (20 Wend. 431), where some additional facts are stated, as that the goods purchased were not only several different articles, at different bids, at distinct prices for each,

but also that these articles were entered upon different catalogues; as though, in this case, the stable stock had been entered on one catalogue, and the furniture and carpets on another. The same doctrine is held in *Baldey v. Parker*, 3 Dowl. & Ry. 222; *Elliott v. Thomas*, 3 Mees. & Wels. 170; *Dykes v. Blake*, 4 Bing. (N. C.) 463; *Scott v. Eastern Coa. Railway Co.*, 12 Mees. & Wels. 33; *Hart v. Mills*, 15 id. 85.

It could make no difference whether the auction continued one day or several days, upon the same stock of goods or the same lot of hotel property, the terms of sale being the same upon the whole. Suppose the terms of sale at an auction to be, that all sums less than thirty-three dollars shall be paid down in cash, but that, upon all sums exceeding that amount, a credit of ninety days is to be given, with approved securities. At the close of the auction, whether it had continued one day or three days upon the same lot of goods, sold upon the same terms, the purchaser comes forward to settle, and finds that he has bought twenty different articles, the price of either one of which alone is less than thirty-three dollars, but in the aggregate they amount to three hundred dollars. We think the universal practice is, and that the uniform understanding would be, that he was entitled to the ninety days' credit on the whole sum, because, in the aggregate, his purchases amounted to more than thirty-three dollars. Aside from the binding force of the memorandum in writing which an auctioneer might make, there would be no substantial difference between that case and a purchase of the same articles at the same prices at private sale. *Baldey v. Parker*, *supra*; S. C., 2 Barn. & Cress. 37; *Mills v. Hunt*, 20 Wend. 431; *Coffman v. Hampton*, 2 Watts & Serg. 377; *Barclay v. Tracy*, 5 id. 45.

In the case before us, the terms of the sale were cash on delivery. In general, the knocking down of the property to the highest bidder operates as a delivery of the property if it is present and movable, such as these four articles enumerated in the case were, and the same would be true of the stable stock, whether horses, carriages, harnesses, or other property; and that seems to have been the understanding here, so far as the stock was concerned, which was not only delivered, but accepted and taken away, but not paid for at the time, nor was it at all until after the commencement of this suit. How was it with the other property?

When the terms of sale are cash on delivery, as in this case, the

Jeaness v. Wendell.

vendor has a right to hold a lien upon the property for the payment, and may hold it till the price is paid, if he choose. Chitty on Cont. 374, 375, 427-429, and cases cited. But, as a general rule, the property in the goods sold at auction passes to the purchaser if there is nothing to be done to the property before its delivery, either to separate it from other property, or to put it in condition to be ready for delivery. In this case, every thing was put in condition to be delivered: even the carpets had been measured, scheduled, and numbered, and were sold by the yard, the vendor stating the number of yards in each. This would amount to a warranty of quantity as well as of title, which is entirely consistent with the theory that the property passed at once to the vendee. 2 Kent's Com. 480; *Vincent v. Germond*, 11 Johns. 283; 1 Smith's Lead. Cases, 308. We think the understanding was, that the property should pass at the sale, especially as the vendor was intending to sell his tavern-house, as well as his furniture and stock, at this sale, and close up his business. If the man who had bid off the tavern house had completed his purchase and taken a deed of the premises, it seems evident that all parties would have understood that these carpets were there as the property of the defendant.

There was nothing more to be done by the vendor. The carpets were measured and scheduled. The vendor guaranteed in that way the title and the quantity, and the vendee could examine the quality for himself, and did so, and bought by the yard. If the defendant wished to test the measure, or to make further examinations in that regard, he should have done so at once; but he did nothing of the kind, and the defendant's evidence tends to show that he did not desire to do any thing more, but considered the property as his own. All the evidence offered on both sides tends to show that the defendant would have taken the property away before the fire, had he not been requested by the plaintiffs to leave it there, either for the benefit or convenience of one party or the other, which presupposes the defendant's right to take it at any time, and to control it.

Although in a case like this, where the price was to be paid on delivery, the delivery of the property without payment would not be conclusive of the waiver of the payment (*Ferguson v. Clifford*, 37 N. H. 86; *Dudley v. Sawyer*, 41 id. 326), yet such would be its strong tendency; and we cannot doubt that in this case the vendor, knowing the vendee to be perfectly responsible, was willing to waive the payment and relinquish his lien upon the property, and did so,

and that the property passed to the defendant at the sale. Such was evidently the case with the stable stock; and we think, upon the evidence, that the property all stood alike, and there was no distinction between the stable stock and the furniture, and that a delivery of a part of this property, and its acceptance by the vendee, was sufficient to take the whole purchase out from the operation of the statute of frauds, and that the title to all the property passed to the defendant at the time of the sale.

In New Hampshire we have no direct authority upon this point. In *Messer v. Woodman*, 22 N. H. 172, 176, WOODS, J., says, "If the action was brought to recover damages for the non-performance of the contract of sale, the effect of the statute of frauds upon the contract might become a material matter of inquiry, and it would in that view be material whether a sale by separate lots and constituting separate contracts of sale of each lot is shown by the case, or whether the sale of the several parcels of hay may be regarded as one sale of all the parcels." He quotes Chitty on Contracts, and some other authorities which have since been overruled or essentially modified, but decides nothing, as no question of that kind was raised in the case.

In *Gilman v. Hill*, 36 N. H. 311, 318, EASTMAN, J., says, "If the sale be of a number of articles at the same time, neither of which is of the price of \$33, but which in gross exceed that sum, the contract is deemed to be entire and to fall within the statute" — quoting *Baldehy v. Parker*, 2 Barn. & Cress. 37; Comyn on Contracts, 85; see, also, *Hinde v. Whitehouse*, 7 East, 558; *Shepherd v. Pressey*, 32 N. H. 55.

We think the amendment was properly allowed. *Wilson v. Eaton*, 5 N. H. 141; *Stevenson v. Mudgett*, 10 id. 338; *Bailey v. Smith*, 48 id. 409; *Brackett v. Crooks*, 24 id. 173; *Davis v. Hill*, 41 id. 329.

Judgment for the plaintiff.

Prescott v. Locke.

PRESCOTT V. LOCKE.

(51 N. H. 94.)

Statute of Frauds — Sale and delivery — articles to be manufactured. Evidence.

Defendant agreed orally to buy of plaintiff what walnut spokes he should saw at his mill, not exceeding 100,000, at \$40 per thousand, to be delivered at the mill in lots of about 10,000 each, subject to defendant's selection, each lot to be paid for on delivery. Nothing was said about counting, but each party understood that he was to count them after selection. The defendant selected the first lot but did not count them. The plaintiff afterward counted those selected and charged them to defendant but did not inform defendant of the number. The spokes having been burned, *held*, in an action for their value, that the sale was not perfected, and that the title to the property remained in plaintiff.

An oral contract for sale and delivery of an article to be subsequently manufactured by the vendor is within the statute of frauds, unless the agreement calls for the peculiar skill, labor or care of the manufacturer, in which case it is for work and labor and not within the statute.

To place articles sold at buyer's risk, delivery and acceptance must be such that nothing remains to be done by either party in respect to them; and where the sale is of a quantity of things by count, measure or weight, their number, quantity or weight must be determined before the sale is perfect in the absence of an express intention to the contrary; and the same rule applies when delivery is to be made of the sold articles by installments.*

Where the mutual understanding of the parties is to determine the existence of a contract, evidence of their individual understandings is admissible.

ACTION brought by plaintiff to recover on an account for 9,130 spokes at \$40 per thousand; \$365.20. Plaintiff was the owner of a saw-mill; defendants were makers of carriage wheels. Defendant Locke agreed orally with plaintiff to buy what walnut spokes he should saw at his mill for \$40 per M. delivered at the mill in lots of 10,000 each, selected by defendants and paid for on delivery. Plaintiff was not to saw more than 100,000 in all. Nothing was said in reference to counting, but plaintiff understood that he was to count each lot selected, and defendants that they were to count each lot selected before they took them from the mill, and that they were not to belong to defendant or to be taken away until culled and counted. The agreement was made in October, 1868, and on January 14,

* See *Graf v. Fitch*, 11 Am. R. 85 and note, 90.

Prescott v. Locke.

1869, defendant Locke came to plaintiff's mill and culled every spoke of the first lot, amounting to about 10,000 or 12,000, rejecting some and selecting others which he piled separately and compactly. He was to send a team for them January 18, 1869, and take them away and pay for them February 1, 1869. On the 16th and 18th January, 1869, plaintiff counted the selected pile and found it numbered 9,130, which he charged to defendants then and there. Defendants, on account of the bad condition of the roads, did not send for the lot of spokes, and on the 22d of January, 1869, they were destroyed by fire. Defendants did not count them or accept plaintiff's count, and did not know the number before the trial. The personal care or skill of the plaintiff in manufacturing spokes was not a part of the contract.

Small & Wiggin, for plaintiff.

Mr. Marston, for defendants.

FOSTER, J. The contract in this case was not for the plaintiff's labor, but was for the sale of merchandise to be subsequently manufactured.

It was not a contract to make spokes for the defendants; but it was an agreement that the defendants "would buy of the plaintiff what walnut spokes he should saw at his mill, at \$40 per thousand" for the manufactured article.

Where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. In such case the party supplying the chattel cannot recover for his labor in making it. If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for labor; but if the result of the contract is that the party has done work and labor which end in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. Per BLACKBURN, J., in *Lee v. Griffin*, 1 Ellis, Best & Smith, 272.

Illustrations of the former proposition are: Where a carriage was ordered to be made, which would never, but for the order, have had an existence, but when made becomes the subject of sale. This

Prescott v. Locke.

principle has been applied even to a contract for the making of a coat, a statue, a set of artificial teeth, from materials provided by the maker, even where the peculiar skill of the maker is considered to be an important element in the consideration of the contract; for the value of the skill and labor, as compared with that of the material supplied, is not a criterion to determine what the contract is.

The true construction in this case is, that the contract was for the future sale of the spokes, when they should be in a state fit for delivery. The vendor, so long as he was sawing the timber and doing any other work preparing it for delivery in the form of spokes, was doing work for himself upon his own materials, and not for the defendants. *Smith v. Surman*, 9 B. & C. 561.

Where the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the vendor's bestowing labor on his own raw materials — that is a case of a contract for sale, within the statute of frauds. *Garbutt v. Watson*, 5 B. & Ald. 613; *Smith v. Surman*, before cited.

This was a contract for the purchase of such walnut spokes as the plaintiff should saw at his mill, not exceeding 100,000, to be delivered at the mill in lots of about 10,000 each, subject to the defendant's selection. It would be absurd to say that the defendants were to select the spokes before they had become the subject of sale — prepared, by the previous work of the vendor, for the market. The plaintiff was to convert the timber into spokes, and, when so converted, the delivery and acceptance thereof were to occur. Until that time the contract would remain executory, and the title to the property would continue to be in the plaintiff. If the plaintiff had caused or permitted the spokes to be improperly or imperfectly manufactured, or to be made from other than good walnut timber, the defendants would not have been bound to accept or pay for them. *Gorham v. Fisher*, 30 Vt. 428.

Still the plaintiff would not necessarily lose the price of his labor. If the purchaser did not take the goods, others probably would. The labor bestowed on them was in the line of his business, and we may reasonably infer that his labor would have been bestowed in the production of such goods had the contract not been made. *Cason v. Cheely*, 6 Ga. 554.

It is very clearly settled by the more recent English and American
VOL. XII. — 8

cases, that it is not essential that the goods be capable of delivery at the time of making the contract, to bring it within the statute of frauds. *Pitkin v. Noyes*, 48 N. H. 298; 2 Am. R. 218; *Finney v. Apgar*, 31 N. J. 266.

In *Pitkin v. Noyes* it is said, "If, however, a person contract to make and deliver, at a future time, certain goods at prices then fixed, or at reasonable prices, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute;" and such is undoubtedly the law. In that case it was deemed proper to leave it to the jury, in view of all the circumstances of the case, to find whether the contract was essentially for the labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them, or whether it was substantially a sale of potatoes which he might raise himself, or procure by purchase or otherwise. The remark of the court that "it is obvious that the plaintiffs might have an interest in stipulating that the defendant should himself raise the potatoes" preceded this disposition of the case, and the considerations suggesting that remark apparently controlled the disposition of it.

We understand the expression quoted from *Pitkin v. Noyes* to mean, not precisely what is literally imported by it, but rather that it might be obvious that the plaintiffs might have an interest in stipulating that the potatoes should be raised upon the defendant's land, which might be regarded as peculiarly adapted to the raising of potatoes of a superior quality. And if that be the construction to be given to the remark, the consideration and the result were well enough.

But in the present case, it appears that it was no part of the essence of the contract that the plaintiff should, with his own hands and by the exercise of his own peculiar skill, manufacture these spokes, which the defendants were only bound to take after they had been culled out and selected by themselves.

This being a contract for the sale of chattels, we come, then, to the question whether there was such a delivery and acceptance of the spokes as transferred the property and title from the plaintiff to the defendants; for it is conceded that there was no part payment, earnest, or memorandum given, within the terms of the statute of frauds. Gen. Stats., ch. 201, § 14. And therefore the plaintiff cannot maintain assumpsit founded upon the contract, either for goods

bargained and sold, or for goods sold and delivered, without showing such delivery and acceptance as shall be sufficient to take the case out of the operation of the statute.

In his chapter entitled "At whose risk the thing sold is, during the intermediate time between the contract and the delivery," M. POTHIER discourses as follows: "Having established the principle that the thing sold is at the risk of the buyer as soon as the contract is perfected, it becomes necessary to inquire when the contract receives its perfection; and, generally, the contract of sale is considered to be perfect as soon as the parties are agreed upon the price for which the thing is sold.

"This rule holds when the sale is of a specific thing, and is absolute (*pure et simple*): *si id, quod venierit appareat quid, quale, quantum sit, et pretium, et pure venit; perfecta est emptio*.

"If the sale is of things which consist in *quantitate*, and which are sold by weight, number or measure — as, if one sells ten casks of the corn which is in a certain granary, ten thousand pounds of sugar, or one hundred carp, etc.— the sale is not perfect until the corn is measured, the sugar weighed, or the carp counted; for, until such time, *nondum apparet quid venierit*.

"It does not yet appear which is the corn, which is the sugar, or the carp, that makes the object of the sale, since that object can only be the corn that is to be measured, the sugar that is to be weighed, or the carp that are to be counted.

"It is true that before the measuring, weighing or counting, and at the instant of the contract, the engagements which result from it exist. The buyer is then entitled to an action against the seller for a delivery of the thing, and the seller is entitled to an action against the buyer for a recovery of the price, upon offering to deliver it. [It will be borne in mind that the author, treating of the civil law, is not embarrassed by the consideration of the statute of frauds.] But, though the engagement of the seller subsists from that time, it may be truly said that it is not yet perfect, in this respect, that as yet it is only of an object which is indeterminate, and which can be determined only by the measuring, weighing or counting. For this reason, until the thing is measured, weighed or counted, it does not become at the risk of the buyer; for the risk cannot fall but upon some determinate thing.

"This rule holds, not only when the sale is of a certain quantity of merchandise, to be taken from a magazine which contains a

larger quantity, because in such a case, as we have seen, until the measuring or weighing that which is sold does not consist of any determinate body or thing upon which the risk may fall, it also holds when the sale is of the entire quantity contained in a magazine or granary, provided it is made at the rate of so much the pound, or so much the measure, etc.

"The sale in this case is not considered as perfect, and the thing sold is not at the risk of the buyer until it is measured or weighed, for, until that time, *non apparet quantum venierit*. The price, being constituted only for each pound which shall be weighed, or for each cask which shall be measured, is not yet determined before the weighing or measuring; and consequently the sale, before that time, is not so far perfect that the risk of the thing may fall upon the buyer. He ought not to be charged with it until after the goods are weighed or measured.

"But if the goods are not sold by weight or measure, but *per aversionem*, that is, in bulk, and for a single and only price—in such case the sale is perfect from the instant of the contract, and from that time these goods, the same as all others, are at the risk of the buyer."

The learned writer then proceeds to lay down certain rules for determining when the sale is considered as made *per aversionem*, and when by measure; and in the latter category he places the case where the price is expressly agreed upon for each measure, "whether the contract imports that it is of so many bushels of the grain in such a granary, at the rate of so much the bushel, or of a heap of grain which is in such a granary, and which contains a thousand bushels, at the rate of so much a bushel."

The sale is considered to be made *per aversionem* "when it is made for a single price, not of so many measures of such a thing, but of such a thing which is declared to contain so many measures." In such case the expression of the number has no other effect than to oblige the seller to make an allowance for the defect of quantity. Pothier Contr. of Sale, §§ 309, 310.

Tried by these tests, which we believe to be sound, it is quite clear that the contract before us was for a sale by measure or count, and not a sale *per aversionem*, and that the spokes were at the risk of the seller until the sale was perfected, which could not be so long as *non apparet quantum veniet*.

Now the question here is, was this sale perfected, so as to pass the title to and impose the risk upon the purchaser?

Whatever may have been the intention or understanding of either party or of both, it must be controlled by the statute of frauds. The statute is highly beneficial, indispensable indeed, and it must receive a favorable and liberal construction, *ut sit finis litium*, and to prevent perjury, and the mistakes and dangers resulting from evidence founded on imperfect memory.

By the terms of the statute, in the absence of part payment or a written memorandum, the buyer must "accept and actually receive" the property. It follows, therefore, that although, as matter of fact, in a particular case, there may be acceptance without delivery, or delivery and reception without acceptance, both conditions must be fulfilled before the title and risk can be transferred. And the acceptance must be clear and unequivocal. *Nicholls v. Plume*, 1 C. & P. 272.

In this case the culling of the spokes was not an acceptance of quantity, but only of quality—for then the quantity and price of the quantity was indeterminate; still there was a manual caption of the spokes by the buyers, at the place of delivery. Such delivery and reception was not enough to transfer the title and risk, without an acceptance of the property as a determined quantity; for such an acceptance depended upon a counting of the spokes.

But after the culling of the spokes by the buyers, the seller counted them, and charged them upon his book to the buyers. Whether this act of the seller can be regarded as a completion of the purchase, so as to transfer the title and risk to the defendants, may be a question to be governed by the understanding and intention of the parties. It must, of course, be a mutual understanding and intention; otherwise it is no element in the contract. It is manifest that the defendants are not to be bound and concluded as to quantity, and consequently as to price, unless they have expressly or impliedly agreed to be so bound.

Upon this subject the case finds that nothing was said about counting the spokes. The plaintiff understood that he was to count each lot selected by the defendants, and the defendants understood that they were to count each lot selected by them, before they took them from the mill; but it does not appear that both parties understood the defendants were to count the spokes. Still, if the defendants understood they were to count the spokes, it is manifest

they understood that they were not to be bound by the plaintiff's count.

Could the plaintiff have understood the reverse of this? If so, would he not have rendered a bill of the quantity? The year preceding, the defendants had purchased of the plaintiff about 27,000 spokes, which were selected by the defendants and counted by both parties before they were removed from the mill. This fact would tend, in some degree, to show that the plaintiff, as well as the defendants, understood that the latter were not bound to accept the count of the former as true.

The evidence of both the defendants was admissible, to show the independent understanding in this particular (*Graves v. Graves*, 45 N. H. 323; *Hale v. Taylor*, id. 406), provided such understanding does not come in conflict with legal principles or an express provision of law of superior and controlling effect. *Blake v. White*, 13 id. 272; *Hale v. Taylor*, before cited; *Delano v. Goodwin*, 48 id. 206; *Cook v. Bennett*, 51 id. 85.

This is a question of the construction of the agreement between the parties; and it is clear that the parties have not expressed, by the terms of the contract nor by their acts, their intention in a manner that leaves no room for doubt. The intention, therefore, must be collected from the whole agreement and the conduct of the parties, and it must be governed by the settled legal rules of construction, if any such rules are found to be applicable.

Mr. Blackburn (Sales *151-3) has discovered two rules, which are in terms nearly equivalent to those in which they are laid down by Pothier as the rule of the civil law.

The first is, "where, by agreement, the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property."

The second is, that "where any thing remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods — where the price is to depend on the quantity or the quality of the goods — the performance of those things, also, shall be a condition precedent to the transfer of the

Prescott v. Locke.

property, although the individual goods be ascertained, and they are in a state in which they ought to be accepted.

"Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold." Blackburn on Sales, *154.

To these Mr. Benjamin adds a third rule: "Where the buyer is, by contract, bound to do any thing as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benjamin on Sales, 222.

The substance of these three rules seems to be tersely expressed by Mr. Justice STORY, thus: "To constitute delivery so that the property will pass, nothing must remain to be done concerning it by either party. *Barrett v. Goddard*, 3 Mason, 111. Or thus, it is said: "The principle that runs through all the cases is, that when something remains to be done, as between buyer and seller, or for the purpose of ascertaining quantity or price, there is no delivery." *Rapelye v. Mackie*, 6 Cow. 253; *Fuller v. Bean*, 34 N. H. 300; *Warren v. Buckminster*, 24 id. 342; 2 Kent's Com. 496; *Russell v. Carrington*, 42 N. Y. 118; *Davis v. Hill*, 3 N. H. 382; *Barnard v. Poor*, 21 Pick. 378; *Hanson v. Meyer*, 6 East, 614.

Such fact will generally be conclusive that there was no acceptance so as to bind the parties. Brown on Frauds, § 317.

Where the defendant orally purchased of the plaintiff a quantity of tares by sample, and left them on the plaintiff's premises, saying that he had no immediate use for them, and requested that they might remain there till he wanted to sow them, which was agreed to—and afterward the tares were measured out by the agent of the plaintiff, and set apart in his granary, and ordered to be delivered to the defendant when he called, and the defendant afterward refused to take them, for which the action was brought—the court of queen's bench nonsuited the plaintiff, holding that the defendant had not accepted the tares within the meaning of the statute. The decision seems to have gone upon the principle that the buyer would have the right, when the tares were tendered to him, to reject them, as deficient in quantity or as not agreeing with the sample, a right which he could not be presumed to have waived. Brown on Frauds, § 324.

If a sale is not complete, if any thing remains to be done concerning the property by either party, a present right of property does not vest in the buyer. If any condition precedent, such as the ascertainment of the quantity, and thereby of the gross price, is not performed or waived, the sale is not complete: such is the rule of the common law.

This rule may be abrogated by express agreement of the parties, but the intention to change it so that the title shall pass at once must be unequivocal and distinct; otherwise the construction required by the principles of law must overrule the possible intention. *Russell v. Carrington*, 42 N. Y. 118; 1 Am. R. 498.

Measures to ascertain quantity or price may be agreed on, but tacitly waived, or expressly postponed or dispensed with. *Macomber v. Parker*, 13 Pick. 183.

But the rule is laid down in *Stone v. Peacock*, 35 Me. 388, thus: "Where some act remains to be done in relation to the property which is the subject of sale, and there is no evidence to show any intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to a consummation of the contract, and until it is performed the property does not pass to the vendee." *Ockington v. Richey*, 41 N. H. 275.

In *Fuller v. Bean*, Mr. Justice BELL said, — "There has been an inclination, in some cases, to regard a delivery as absolute when no condition is insisted on, and to consider such a delivery as a waiver of the condition. But this, we think, must depend on the intent of the parties, to be ascertained from all their language and conduct, and not from the single fact of delivery." "A mere assumption of ownership or control by the purchaser will not be sufficient evidence of a delivery, without proof of consent or acquiescence." And see *Kelsea v. Haines*, 41 N. H. 246.

In the present case, the spokes were to be taken by the defendants from the mill, and they were deposited in the place from which the defendants might remove them on the completion of the contract. But this fact alone would not constitute a delivery in law. The defendants had no right to remove them before the quantity and the price regulated by the quantity was ascertained.

An important act, the act of counting the spokes, remained to be done, in which both parties had the right to participate, unless that right was waived by the defendants. *Stone v. Peacock*, before cited.

Prescott v. Locke.

Is there any evidence competent to be submitted to a jury, tending to show any intention of the parties to make an absolute and complete sale, delivery and acceptance, without a compliance of the prerequisite condition of ascertaining the number of the spokes?

Is there any evidence of any waiver by the defendants of their right to participate in the important act of counting the spokes?

It appears that "the defendants understood they were to count each lot selected by them, before they took them from the mill." Is there any evidence that the plaintiff had not the same understanding?

It appears that the result of the seller's enumeration was never communicated to the buyers till long after this suit was brought. If it had been understood by the parties that the buyers were not to participate in the counting, it would naturally be required that, before removal to the defendants' mill, a statement of that count should be rendered in order that the buyers might verify it. The plaintiff could not expect the defendants to pay for the spokes until they knew how many they were to pay for. Suppose the plaintiff had charged the defendants with 10,000 spokes, and the defendants, at the time of loading them for removal, had discovered that the actual number was but 9,000, would they not have the right to reject the plaintiff's count, and revoke and repudiate the whole trade? If so, there was no prior irrevocable acceptance, to satisfy the terms of the statute. It can make no difference, in this respect, that the defendants might have a remedy against the plaintiff to compel him to make good a deficiency, ascertained after final acceptance. That is an independent consideration.

The remark of Lord ELLENBOROUGH, in *Hanson v. Meyer*, that "it certainly never was in the contemplation of the seller to waive the act of weighing any part of the commodity contracted for," is equally applicable to the present case.

Suppose the defendants had removed the spokes at the time they selected them from the common mass, we apprehend the plaintiff would not have considered himself bound to accept as the true *ex parte* count of the defendants, made in his absence, without notice to him and an opportunity to verify the count before the removal of the property.

The fact is, the counting of the spokes was a material act, in which both parties were equally interested; and an *ex parte* adjudication, so to speak, of a matter so material as quantity and price,

must almost inevitably have led to the very results which the statute of frauds was intended to prevent.

Suppose a creditor of the defendants had attached these spokes while lying in the plaintiff's mill-yard, before they were counted by the defendants, it would not seem to be very strange if the plaintiff should insist that the sale was not perfected; and, again, the mischief which the statute tends to avoid would have been precipitated. These illustrations show the necessity of a rule which shall require the provisions of the statute to be applied, except in a strong and unequivocal case of manifest waiver of their requirements. The postponement of the day of payment, originally provided for, furnishes no indication of the renunciation of all the other prerequisites of a valid transfer of title.

It would be quite natural that the defendants should count the spokes at the time of loading them, as was in fact done the previous year. There would thus be an opportunity for the defendants to verify or correct the plaintiff's enumeration before the removal of the property to the defendants' factory, where the spokes would be without the plaintiff's control for any purpose.

The act of charging the spokes upon the plaintiff's book has no significance. In the well-known custom of merchants, such an act usually precedes the removal of the property.

Upon the whole, we fail to discover any evidence from which a jury would be at liberty to find a waiver of the defendants' right to insist upon a participation in a matter so material as the determination of the quantity of spokes; and we are of the opinion that, under the application of the recognized principles of law, it is incumbent upon us to hold that the sale was not perfected, and that the title to the property remained in the plaintiff at the time of its destruction.

Under the provisions of the case, there must be

Judgment for the defendants.

Cochecho National Bank v. Haskell.

COCHECHO NATIONAL BANK V. HASKELL.

(51 N. H. 116.)

Banking — authority of cashier to discharge surety. Estoppel.

A cashier has no authority to bind the bank by a discharge of its debtors, without payment or to release a surety by an agreement that he should not be called upon to pay a note that he was liable on in ordinary cases; but if knowing one to be a surety upon a note, he inform him that such note is paid, intending him to believe it, and the surety, relying upon that statement, changes his position toward his principal by indorsing a new note or giving up his securities, the bank will be estopped from denying that the note is paid. (*See note, p. 75.*)

ASSUMPSIT by the Cochecho National Bank against Ezra Haskell, Paul A. Stackpole and John Q. A. Smith, to recover the balance of a promissory note, for \$800, dated July 3, 1866. Haskell was maker and Stackpole and Smith sureties. The note contained a clause that the bank might extend the time of payment without discharging the sureties. Default was taken against Haskell and Smith, but defense was made by Stackpole, in the following brief statement:

That defendant Stackpole would prove on the trial, that the note in suit was signed by him as surety for Haskell, and subsequently he likewise signed other notes, viz., one dated September 17, 1866, for \$2,000, and one dated November 12, 1866, for \$1,000, and at the time the \$2,000 note was signed plaintiff had property of Haskell's, ample security to fully discharge defendant Stackpole's liability on same, which it neglected to apply in payment thereof. That in February, 1869, plaintiff recovered a judgment against defendants and others on the said notes for \$2,000 and \$1,000, and that on April 30, 1869, in consideration of \$800 paid by said Stackpole, the plaintiff, by its cashier duly authorized, agreed not to enforce or collect said judgment or any part against said Stackpole or his estate. That while said judgment was pending, said Stackpole was informed with others by said cashier, that the notes, the foundation of said judgment, were the only ones payable to plaintiff upon which said Stackpole was liable as surety for said Haskell, and that it was then understood and agreed by said cashier and said

Cochecho National Bank v. Haskell.

Stackpole and Haskell, that the \$800 so paid was a full discharge of any and all liability to the plaintiff by said Stackpole as surety for said Haskell.

The motion to reject this statement was denied and plaintiff excepted.

Stackpole under exception testified, that just before he signed the \$2,000 note above mentioned, he asked Ezekiel Hurd, plaintiff's cashier, if the \$800 note (the one in suit) "which defendant claims, and for the purposes of this case may be considered as the only note in the bank at that time signed by Stackpole as surety for said Haskell," had been paid, and received an answer that it had been paid or secured so that he would have no further trouble from it. After judgment on the \$2,000 and \$1,000 notes, that he settled with said Hurd for his liability on the judgment, paid the plaintiff \$800 and took a discharge in writing.

Defendant then offered to show by parol, that when the discharge was executed, it was understood that the judgment was on the only notes that Stackpole was liable on as surety for said Haskell, and that the payment of the \$800 was a full discharge of any and all claims which the bank had against him as such surety. The court ruled that the writing itself was the only competent evidence and defendant excepted. The writing, as follows, was then offered and received subject to objection.

"Whereas, the Cochecho National Bank, at the supreme judicial court for Strafford county, at the February term, 1869, recovered judgment against Ezra Haskell, Paul A. Stackpole, and others, for the sum of twenty-five hundred and seventy-seven dollars and three cents debt, and seventeen dollars and ninety-nine cents cost of suit, which judgment was founded on certain notes of hand signed by said Haskell as principal, and by said Stackpole and others as his sureties; and whereas said Stackpole has paid to said bank the sum of eight hundred dollars as his reasonable proportion of said judgment; now said bank, in consideration of such payment to said bank, hereby agrees, promises, and covenants, to and with said Stackpole, that said bank will not hereafter enforce said judgment or the execution issued thereon against said Stackpole, or his estate, or his administrators or heirs or their estates, or in any way by action, process, assignment or otherwise, against said Stackpole or his representatives, attempt to collect the remainder of said judgment, or

Cocheco National Bank v. Haskell.

the demands upon which the same is founded, or any part thereof. In witness whereof, said bank, by Ezekiel Hurd, its cashier, for that purpose duly authorized, has caused its seal to be hereto affixed, and this agreement to be by it signed and executed, in its name and behalf, this 30th day of April, A. D. 1869.

"Hereby releasing the real estate of said Stackpole from any attachment made thereof to secure said judgment, or any part thereof.

[L. S.]

"EZEKIEL HURD, *Cashier.*"

[Five cent stamp.]

The only evidence of the authority of the cashier to compromise or settle the claims of the bank with said Stackpole was the following vote of the directors, introduced by the plaintiff:

"1869, April 28.

"At a meeting of the directors this day, at seven o'clock, P. M., all present except J. E. Bickford, *Voted*, If Paul A. Stackpole would pay \$800 on a judgment against E. Haskell, said Stackpole and others, that this bank would not call on said Stackpole for any more on said judgment.

"EZEKIEL HURD, *Cash.*"

The discharge being under the seal of the bank, the court rejected the above evidence offered by the defendant, and he excepted.

Sawyer, Hobbs and Wheeler, for plaintiff.

White and T. J. Smith, for defendant.

BELLOWS, C. J. Stackpole testified that just before signing the \$2,000 note, he asked Mr. Hurd, the cashier of the bank, if the \$800 note — which was the only note in the bank signed by Stackpole as Haskell's surety — had been paid; and he received for answer that it had been paid or secured, so that he would have no further trouble about it.

The question is, whether this would constitute a good defense if these facts were found, and if so, whether they are admissible under the brief statement, or independent of it.

surety, the creditor may discontinue the suit and release the property, then the surety must be presumed to know the law, and, without some assurance that the suit should be prosecuted, or that he was to be exonerated, it would be his own folly to be lulled into security by information of a fact upon which no reliance could be placed for indemnity.

In the case before us, it does not appear that Stackpole was induced to change his position by this information from the cashier, although he soon after signed another note for Haskell. To make out the estoppel, it must appear that he was induced to sign it by this information of the cashier. The question then is, Had the cashier authority to bind the bank by these representations?

The acts of a cashier, done in the ordinary course of the business actually confided to such an officer, may be regarded, *prima facie*, as coming within the scope of his duty. He is held out to the public as having authority to act according to the general usage, practice and course of business of such institutions; he is the financial officer of the bank. *City Bank v. Perkins*, 29 N. Y. 554. He is usually intrusted with all the funds of the bank, in cash, notes, bills, and other choses in action, to be used, from time to time, for the ordinary and extraordinary exigencies of the bank; he receives directly and through subordinate officers all moneys and notes; he delivers up all discounted notes and other securities, when payments have been made; he draws checks from time to time for moneys, whenever the bank has deposits. In short, he is considered the executive officer, through whom and by whom the whole moneyed operations of the bank, in paying or receiving debts, or discharging and transferring securities, are to be conducted.

This is the doctrine of *Fleckner v. The Bank of the United States*, 8 Wheat. 360; and it is fully recognized in *Corser v. Paul*, 41 N. H. 27 — and it is so laid down in Story on Agency, § 114, and Angell & Ames on Corp. 295-297.

So he may issue certificates of deposit, transfer by indorsement the negotiable paper belonging to the bank or left with it for collection, and receive payment of dues to the bank and give receipts therefor. Angell & Ames on Corp. 296, 297, and cases cited; Story on Agency, § 115; *City Bank v. Perkins*, 29 N. Y. 554; *Bank v. Wheeler*, 21 Ind. 90; *Wild v. Bank of Passamaquoddy*, 3 Mason, 505; *Robb v. Ross Co. Bank*, 41 Barb. 586; *Sturges v. Bank of Cir-*

Cochecho National Bank v. Haskell

deville, 11 Ohio, N. S., 153 — holding that a cashier, on selling a bill of exchange, may bind the bank by his affirmations.

It is laid down, however, in *Story on Agency*, § 115, that the cashier of a bank has no incidental authority to make any declarations binding upon the bank in matters not within the scope of his ordinary duties — as, for example, by assuring a person about to indorse a note offered for discount, that he will incur no risk and no responsibility by becoming an indorser. And such is the doctrine of *United States v. Dunn*, 6 Peters, 51; *Bank of Metropolis v. Jones*, 8 id. 12.

In both of these cases there appears to have been pledged property of the principal; and in the first case, the court say that all discounts are made under the authority of the directors, and it is for them to fix the conditions which may be proper in loaning the money.

In *Savings Bank v. Downing*, 16 N. H. 188, it was held that the treasurer could not bind the bank by a promise to notify the sureties of any failure to pay on securities furnished by the principal.

So in *Bank v. Rogers*, 18 N. H. 255, 261, it was held that declarations of two directors and the cashier that the note in suit was given for a certain other note supposed to be invalid were not admissible, not being made in discharge of any duty imposed on them, but a mere narrative of a past occurrence.

So a promise by a cashier to pay a forged note purporting to be issued by the bank is not within the scope of his authority, and does not bind the bank. *Salem Bank v. Gloucester Bank*, 17 Mass. 29; though if he had actually paid it the money could not be recovered back, because the cashier has an implied authority to decide on the genuineness of the signatures. *Angell & Ames on Corp.* 296, 297, and cases cited.

The treasurer of a savings bank cannot release a debt of the bank without special authority. *Dedham Institution of Savings v. Slack*, 6 Cush. 408.

In *Olney v. Chadsey*, 7 R. I. 224, it was held that the president of a bank has no power, *virtute officio*, to give up to a debtor securities held by the bank against him.

In view of these principles and authorities, we think the cashier of a bank has ordinarily no power to discharge a debtor of the bank without payment, or to bind the bank by an agreement that a surety should not be called upon to pay a note he had signed, or that he

Cocheco National Bank v. Haskell.

would have no further trouble from it. At least we cannot say that as matter of law he has such authority.

He may, however, have been specially empowered to do the act, or he may have been allowed, by the directors, to take the general charge and management of the business of the bank so as to bring such agreement or statement within the scope of his agency.

This, however, is matter of proof, but as it now stands we cannot hold that the cashier had power to discharge the surety without payment.

It would be otherwise, we think, as to his declaration that the note was paid. It is his duty to receive payment and to keep the account of it, and he is the proper person to apply to, to ascertain whether a note has been paid or not. It would, indeed, be peculiarly within the scope of the business confided to him to give such information.

If, then, on being inquired of by a surety, he had informed him that the note was paid, intending that he should rely upon the statement, and the surety was thereby induced to change his position, the bank would be estopped to deny that the note was paid — *Clafin v. Farmers' Bank*, 36 Barb. 540 — holding that a check certified by the president of the bank was good in the hands of the holder without notice, though drawer had no funds.

For giving information of this kind he must be regarded as the organ of the bank; and if a person standing in the position of surety, and interested to know, is misled by the information he gets, and made to change his position, it is reasonable that the bank which has confided to the cashier this duty should suffer, rather than an innocent third person, who has done as all reasonable men would in relying upon what was told him. The statement that there were no other notes payable to the bank on which Stackpole was surety for Haskell might be understood as equivalent to saying they were paid.

As to the assurance that the debt was secured and the defendant would not be further troubled, that is in the nature of an agreement to discharge the surety, and, as we have seen, cannot be said, as matter of law, to come within the ordinary scope of a cashier's authority.

The release or covenant in favor of Stackpole could not be enlarged by parol to include the \$800 note, and the evidence on that point was rightly rejected.

Cochecho National Bank v. Haskell.

As to the pleading, the defense of payment, or its equivalent, may come in under the general issue without a brief statement—1 Chit. Pl. 477, 478—and, if necessary, the brief statement can be amended.

Case discharged.

NOTE. — Estoppel. Although a promise by a creditor to a surety to look solely to the debtor to proceed against him alone, or an assertion that the debt has been paid, is, of itself, but a *nuda pact* and of no effect, yet, if the surety has been induced thereby to part with sureties or to forego any means of indemnity or protection, an estoppel will arise to the extent of the resulting loss. *Baker v. Briggs*, 8 Pick. 123; *Harris v. Brooks*, 21 id. 195; *Carpenter v. King*, 9 Metc. 511; *Bank v. KlagenSmith*, 7 Watta, 523; *Hickok v. Bank*, 25 Vt. 450.

"The rule of law is clear," said Lord DENMAN in *Pickard v. Sears*, 6 A. & E. 475, "that when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And in *Freeman v. Cook*, 2 Exch. 654, PARK, B., said that the rule laid down in *Pickard v. Sears* "was to be considered as established; but that by the term 'willfully', in that rule, must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, the party making the representation would be equally precluded from contesting its truth."

Authority of cashier. It is stated as a general proposition that officers of banks are held out to the public as having authority to act according to the general usage, practice and course of business of such institutions, and that their acts, within the scope of such usage, practice and course of business, bind the bank in favor of third persons having no knowledge to the contrary. *Story on Agency*, § 114; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Fleckner v. Bank*, 3 Wheat. 360; *Frankford Bank v. Johnson*, 24 Me. 490; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Cook v. State National Bank*, 52 N. Y. 96; 11 Am. R. 667. Thus it has been held that a bank is bound by a certification of a check made by the paying teller, although the drawer was without funds and the teller acted in violation of his duty, and for the mere accommodation of the drawer. *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16 N. Y. 125; *Mead v. Merchants' Bank*, 25 id. 143. And so where the certification was made by the cashier. *Cook v. State National Bank*, 11 Am. R. 667 (52 N. Y. 96); but it is also held in the same cases that the bank in such case would be liable only to a *bona fide* holder. In *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, *supra*, Mr. Justice SELDEN said: "The bank selects its teller and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, so far as known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be responsible?" This view was expressly sanctioned in *Merchants' Bank v. State Bank*, 10 Wall. 604.

In *Barnes v. Ontario*, 19 N. Y. 156, the cashier had issued a false certificate of deposits and the bank was held liable to an innocent holder. So in *Pahantogue Bank v. Bethel Bank*, 4 Am. R. 80 (26 Conn. 325), where the cashier of a bank, in the ordinary business of receiving paper for collection, committed a fraud in not entering the paper received on the books, and in retaining it without collection, protest or notice, the bank was held responsible for the resulting loss.

A bank is bound by acts of its cashier, within the scope of his authority in discharging a mortgage and note, as being acts within the general power of a cashier. *Gyon v. Dunlop*, 17 Ill. 40. Acts of a cashier bind the bank although in violation of the charter when done in pursuance of authority from the board of directors.

Griswold v. Sabin.

Bank of Kentucky v. Schuydell Bank, 1 Pars. (Pa.) Sel. Cas. 130, 248; *Hagerstown Bank v. London*, 3 Grant, 125. See, also, *Badger v. Bank of Cumberland*, 26 Me. 423.

In Massachusetts, however, it is held that a teller of a bank has no authority to certify checks. *Mumsey v. President, etc., of Eagle Bank*, 9 Metc. 303. But banks have been held liable in that State for the fraud or mistakes of their cashiers or clerks in the entries in their books and in false accounts of deposits. *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Forster v. Essex Bank*, id. 479; *Andrus v. Suffolk Bank*, 12 Gray, 461.

But a cashier can bind the bank only by declarations in the scope of his ordinary duties. Thus, where a cashier asserted to a person about to become an indorser on a note offered for discount, that he would incur no risk by becoming such indorser, the bank was held not bound. *Bank of United States v. Dunn*, 6 Pet. 51; *Bank of Metropolis v. Jones*, 8 id. 12; see, also, *Harrisburgh Bank v. Tyler*, 3 W. & S. 373; *Merchants' Bank v. Marine Bank*, 3 Gill. 96.

So a bank is not bound by an agreement of one of its officers to give notice to a surety in case of a default on the part of the makers of a note pledged as collateral, unless it appears that such officer had authority, express or implied, to make the agreement. *New Hampshire Savings Bank v. Downing*, 16 N. H. 187. So a cashier has no power to accept bills of exchange, on behalf of the bank for the accommodation of the drawers, and the holder with notice cannot recover against the bank. *Farmers and Mechanics' Bank v. Troy City Bank*, 1 Dougl. 457. But a cashier, by virtue of his general authority, may borrow money on behalf of the bank. *Barnes v. Ontario Bank*, 19 N. Y. 152; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120. And he is presumed, in the absence of proof to the contrary, to have authority to turn out notes and assets belonging to the bank in payment of its debts. *Kimball v. Cleveland*, 4 Mich. 606; *Crocket v. Young*, 9 Miss. 241; but see *Holt v. Bacon*, 25 Miss. 567. The authority of a cashier to transfer negotiable paper belonging to the bank for a legitimate purpose is undoubted. *City Bank v. Perkins*, 29 N. Y. 554; *Bank v. Wheeler*, 21 Ind. 90. But to transfer non-negotiable paper he must have authority from the bank. *Barrick v. Austin*, 21 Barb. 241. — REP.

GRISWOLD V. SABIN.

(51 N. H. 167.)

Measure of damage—breach of contract to convey real estate. Fraudulent representation.

Parties had a contract for the purchase and sale of real estate; defendant refused to complete the contract by accepting deed and paying the purchase price. *Held*, (1) that the measure of damage to the vendor was the difference between the contract price and the value of the real estate when the vendee refused to complete; (2) that after the vendee had refused to complete the vendor was not obliged to consult him or obtain his consent to a sale of the real estate to another party.

To sustain a defense of fraudulent representation it is insufficient to show that the representations made were simply false. Fraudulent intent in the party making them must be shown.

Griswold v. Sabin.

ACTION on a contract to convey real estate brought by Henry W. S. Griswold against Jedediah Sabin. The defense set up was, first, a plea, *non infregit conventionem*; second, a plea, "that the said deed in the said declaration mentioned was obtained by the plaintiff of the defendant by the fraud and covin of the said plaintiff;" and issue was joined on the pleas. The case comes up on exceptions to the court's charge. The alleged fraud and covin was that the plaintiff represented to defendant that a certain farm had cost him, or that he had paid \$6,000 for it, whereby the plaintiff was induced to agree to buy it at that price.

Defendant asked the court to charge, that if plaintiff made statements material to the contract which were false, and defendant relied upon them to his injury, it was not necessary that they should have been made *malo animo*, but that plaintiff's intent was immaterial. The court declined to charge thus, but did charge that plaintiff could not recover damages if he made false and fraudulent representations, knowing them to be such, concerning the price, which the plaintiff had a right to and did rely upon as true, they being material.

As to materiality the court charged the rule to be, that if the representations were such that the contract would not probably have been made without them, then they were material, otherwise, if the contract would have been made any way; and that as to defendant's reliance on the representations, he was bound to exercise ordinary care and vigilance.

The agreement provided for payment by defendant of \$6,000 upon the tender of warranty deed within a time limited. Deed was duly tendered and refused, and plaintiff, after the lapse of some months, sold the premises to a third party for \$5,500. Thereupon the court was requested to charge that if there was a breach, and afterward plaintiff sold premises without defendant's consent, he was only entitled to nominal damages. The court declined to charge thus, and charged the measure of damage to be the difference between the contract price and the value of the premises when the contract was broken.

The jury gave plaintiff a verdict for \$100.

Lane & Healy, for defendant, citing on the point of the false representations, 3 Greenl. Ev. 13; 4 Bl. Com., ch. 2; 2 Greenl. Ev., § 622, and cases; *id.* 224; 1 Ch. Pl. 154, 389; *Haycraft v. Creasy*,

2 East, 102; 1 Story's Eq., §§ 193, 200; 2 Kent, 487, note *b*; 2 Para. Cont. 267, note *o*; ib. 287, note *a*; *Bedell v. Stevens*, 28 N. H. 125; *Hoett v. Holcomb*, 23 id. 551; and as to measure of damage, *Willson v. Willson*, 25 id. 229; 2 Para. Cont. (4th ed.) 499, 506, and notes.

Wheeler & Faulkner, for plaintiff.

SARGENT, J. The defendant alleges in his second plea that the deed or agreement upon which the declaration was founded was obtained of the defendant by the fraud and covin of the plaintiff. *Fraud* is charged, and must be *proved* to sustain this plea. If the plaintiff made a representation honestly to the defendant, which was material, and which proved to be false, upon which the defendant acted to his injury, that would not sustain a charge of fraud. An honest mistake is not a fraud. The term *malo animo* is treated in the defendant's brief as meaning some *criminal* intent; but it was evidently treated in the charge to the jury as meaning simply a *fraudulent* intent, and that is the sense in which the term is used as often and as appropriately as in any other.

The exceptions to the other rulings of the court, aside from those relating to the rule of damages, are waived by the defendant in argument, and we have not considered them attentively.

As to the rule of damages in this case, there is more room for argument. The rule in England is understood to be well settled in cases of contract for the sale of real estate, and is this: "Where the vendee refuses to perform, the measure of damages is held to be the difference between the price fixed in the contract, and the value at the time fixed on for the delivery of the deeds." *Laird v. Pim*, 7 M. & W. 474, and cases cited.

It has been said to follow from this rule that if the property does not fall in value, the vendor can recover nothing but nominal damages. But that would be assuming that the price agreed on by the parties was the true value, which would ordinarily be the case where the trade was made in good faith.

The same was settled to be the law of Massachusetts, after several rulings the other way, in *Old Colony Railroad v. Evans*, 6 Gray, 25, where the court say — "Upon more full consideration of the question of the measure of damages, in an action at law where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is the differ-

Griswold v. Sabin.

ence between the price agreed to be paid for the land, and the salable value of the land at the time the contract was broken."

In Maine a different rule was established, in *Alna v. Plummer*, 4 Greenl. 258, and in numerous cases in New York, cited in *Richards v. Edick*, 17 Barb. 260-265, where it is held that in this class of cases "the vendor is entitled to recover the full purchase price." But in the opinion, GRIDLEY, J., admits that this rule is not equitable, and that, if it were a new question in that State, "there would be great reason for adopting the principle which is now held to be the law of the English courts." But he felt bound by the precedents in that State, on the ground that the rule had there become so well established that it ought not to be disturbed; though the rule is there held to be different in regard to contracts for the sale of personal property.

In this State the rule is well settled in regard to contracts for the sale of personal property. *Stevens v. Lyford*, 7 N. H. 360; *Woodbury v. Jones*, 44 id. 209; *Gordon v. Norris*, 49 id. 376, and cases cited, 385, 386; *Haines v. Tucker*, 50 id. 307-313.

And we think the same rule should and must be applied in case of contracts for the sale of real estate, where the vendee refuses to receive the deed and pay the price according to the contract.

In this case the defendant objects that the instructions he requested were not given, viz., that if the defendant had broken his covenant, and the plaintiff afterward sold and conveyed the property without the defendant's consent, the plaintiff is entitled to recover only nominal damages. The defendant having broken his contract, the plaintiff might have brought his bill in chancery to compel a specific performance, or he might bring his suit at law for damages on account of its breach. Under the instructions given, it made no difference whether the plaintiff had sold the land or not; its real value at the time when the defendant broke his contract was the only question. If the plaintiff had sold the land at public auction, and notified the defendant, he might have been estopped to say that the price obtained was not its true value. But as the case stands, the plaintiff having sold the land at private sale, he cannot claim that the price obtained was the true value; but as we have seen, upon the instructions given, which we hold to be correct, it became entirely immaterial whether the plaintiff had sold the land or not, or for what price. And least of all could he be required to obtain the plaintiff's consent to the sale, which he might never

Sterling v. Warden.

have been able to do. Upon this general subject of the rule of damages in this class of cases, limited to contracts for the purchase of real estate, see Sedgwick on Damages, 203, and cases; 2 Parsons on Contracts (4th ed.), 506, and cases cited.

Judgment on the verdict.

STERLING v. WARDEN.

(51 N. H. 217.)

Trespass—when license to master will justify entry by servant—Right of postmaster to take public property from his predecessor.

In an action of trespass *quare clausum* and for assault, defendant pleaded that the *locus* was part of plaintiff's house, which had been used by him while postmaster as a post-office; that one G. having succeeded him in that office, had license from him to enter and remove the public property of the United States; that defendant, as assistant-postmaster and servant to G. and by his direction, attempted to enter for that purpose, but was resisted and assaulted by plaintiff, whereupon, etc. (justifying the trespass). *Held*, that the justification was good and would have been so without averment of license.

ACTION for trespass *quare clausum*, brought by Nathaniel K. Sterling against Alexander Warden. The declaration contained three counts, the first charging a breaking and entering of plaintiff's dwelling-house and an assault on plaintiff and his wife, July 30, 1869, and the second and third charged the assault upon the plaintiff and his wife individually.

The defendant pleaded the general issue and nine special pleas, to which special pleas the plaintiff demurred. The decision is upon the demurrer. The following are the pleas:

1. First plea, the general issue.

2. And for further plea in this behalf, said defendant, by leave of the court here for that purpose first had and obtained, comes and defends, etc., when, etc., and prays judgment if the plaintiff his aforesaid action thereof against him ought to have or maintain, because he says that for a considerable time next previous to the 30th day of July, A. D. 1869, being the day upon which said sup-

Sterling v. Warden.

posed trespasses are alleged to have been committed, the plaintiff had been postmaster at and of the post-office in the town of Monroe, in said county of Grafton, and had kept said post-office in a certain room in a certain building in said Monroe, which said building was about ten feet square, and contained no other room, and had been and was erected by the plaintiff for the purpose of being used as a post-office, and was near to and adjoining his dwelling-house in said Monroe, and was connected with said dwelling-house by an inside door opening therefrom into said dwelling-house, and had itself a separate outside door which was ordinarily used for passage into and out of said office; and said post-office was then and there, to wit, on said thirtieth day of July, kept in said room in said building, and the duties of postmaster at said post-office were then and there being done therein by the plaintiff, and said building and room were then and there being used solely and exclusively for the purpose and business of said post-office, and always had been so used since the erection of said building as aforesaid; and sundry books, letters, papers, mail-bags, letter-cases, tables, drawers, and other articles and things belonging to said post-office, had been, during the time since said erection, and were then, to wit, on said 30th day of July, A. D. 1869, remaining and being in said post-office, in the room aforesaid in said building; and a short time previous to said thirtieth day of July, to-wit, on the twenty-second day of said July, the plaintiff was removed by the postmaster-general from said office of postmaster at said post-office, and one John D. Gilchrist was appointed postmaster at and of said post-office in place and instead of the plaintiff; and on said 22d day of July, A. D. 1869, said Gilchrist accepted said appointment, and took the oath of said office, and appointed the defendant assistant postmaster of and at said post-office, and the defendant then and there accepted said office of assistant postmaster, and took the oath of office as such assistant postmaster; and thereafterward, to wit, on the twenty-ninth day of said July, said Gilchrist saw the plaintiff, and informed and notified him of the facts and matters aforesaid, and that he, said Gilchrist, proposed and intended to go to said post-office room in said post-office building, on the thirtieth day of said July, and then and there remove and take away therefrom the aforesaid furniture, articles and other things belonging to said post-office as aforesaid, and remove the same to another building in said Monroe, in which said Gilchrist then

intended and proposed to establish and keep said post-office, which said last mentioned building was the same in which he did immediately thereafterward establish and keep said post-office; and the plaintiff then and there, to wit, on said twenty-ninth day of July, assented thereto, and gave his consent, license and permission that said Gilchrist might and should take away and remove said furniture, articles and things as aforesaid; and thereafterward, on said twenty-ninth day of July, said Gilchrist requested and directed the defendant, together with one Nehemiah H. Lane, to go to and into said post-office room, on the said thirtieth day of July aforesaid, and then and there aid and assist him, the said Gilchrist, in taking away and removing said furniture, articles and things belonging to said post-office, and in removing the same to said other building for the purpose aforesaid; and it was then and there necessary and proper, in order that said Gilchrist should be able and have sufficient force conveniently and properly to take away and remove said furniture, articles and things from said post-office room as aforesaid, that he should then and there be aided and assisted by the defendant and the said Lane as aforesaid, and as was in fact done, in the way and manner hereinafter mentioned.

And the defendant, in compliance with and in pursuance of said request and direction of said Gilchrist, and as his servant, did thereafterward, to wit, on said 30th day of July, A. D. 1869, go to said post-office building and to said room, together with said Lane, for the purpose of aiding and assisting said Gilchrist as aforesaid, and for the other and further purpose of getting and obtaining any mail matter which might then and there be in said post-office for him the said defendant; and when the defendant arrived at said post-office building as aforesaid, and during all the time he was in and about said building and said room, as is hereinafter set forth, said Gilchrist was in and about said building and room for the purpose, and was engaged in the work and business, of taking away and removing said furniture, articles and things as aforesaid; and when and while the defendant was about entering and going into said post-office building through the outside door thereof, which was then and there open, and into said room for said purpose, the plaintiff's wife, Rosetta A. Sterling, did then and there forbid the defendant to enter into said building and room, and did forcibly throw herself in his way, and did make an assault upon the defendant, and did forcibly seize hold of him, and with force resist and

Sterling v. Warden.

oppose his going into said post-office building and room, and would then and there have more and further assaulted and beaten the defendant if he had not immediately defended himself against the said Rosetta.

Whereupon the defendant did then and there defend himself against the said Rosetta, as he lawfully might do for the cause aforesaid, and in doing so did necessarily and moderately push the said Rosetta and remove her out of his way, and did overcome her resistance to his going into said building and room for the purposes aforesaid, using no more force than was necessary and proper for said purpose.

And the defendant thereafter entered through said outside door, which was then and there opened as aforesaid, into said post-office room in said building, as he lawfully might do for the purposes aforesaid, and then and there, together with said Lane, in compliance with and in pursuance of said request and direction of said Gilchrist, and as his servant, did aid and assist the said Gilchrist in taking away and removing from said post-office room said furniture, articles and things belonging to said post-office, and in removing the same to said other building, as he might lawfully do. And the plaintiff did then and there forbid the defendant to enter into said post-office building as aforesaid, and into said post-office room, and to remain therein, and, together with his said wife Rosetta, with force and arms did make an assault and battery upon the defendant, and did with force and arms resist and oppose his entering and remaining in said post-office building and room as aforesaid, and did resist and oppose his aiding and assisting said Gilchrist as aforesaid in taking away and removing said furniture, articles, and things belonging to said post-office; and the plaintiff and his said wife did then and there assault and beat the defendant with a chair, and with their hands and fists, and would then and there have further beaten, bruised and ill-treated the defendant if he had not immediately defended himself against them. Whereupon the defendant did then and there defend himself against the plaintiff and his said wife, as he lawfully might for the cause aforesaid, and in so doing did necessarily and unavoidably a little beat and bruise the plaintiff, and did remove the plaintiff and his said wife out of his way, and did overcome their resistance to his going into and remaining in said post-office building and room for the purposes aforesaid, and to his aiding and assisting said Gil-

christ in taking away and removing said furniture, articles, and things therefrom as aforesaid, using no more force than was necessary and proper for the purposes aforesaid, and doing no unnecessary damage to the plaintiff and his said wife, the said Rosetta. And when the defendant first arrived at said door of said post-office building as aforesaid, and immediately before said assaulting, beating, and ill-treating of him by the plaintiff and his said wife, he notified and informed the plaintiff and his said wife that he came there with and for the purpose of going into said post-office building and room, at the request and by the direction of said Gilchrist, postmaster as aforesaid, in order to aid and assist the said Gilchrist in taking away and removing said post-office furniture, articles, and things as aforesaid, and for the other and further purpose of getting and obtaining any mail matter which might then and there be in said post-office for him, said defendant.

And so the defendant says, that if any damage then and there happened to the said plaintiff or to his said wife, the same was occasioned and caused by the said assaults and batteries of the said plaintiff and wife on the defendant, and the necessary and proper defense of the defendant against the same.

Which are the same supposed trespasses in the introductory part of this plea mentioned, and all the same whereof the plaintiff hath above complained in the several counts of said declaration. And this he is ready to verify.

Wherefore he prays judgment if the plaintiff his aforesaid action against him ought to have and maintain, and for his costs.

The remaining pleas allege self-defense as justification ; license to Gilchrist, principal of defendant, and that defendant acted as servant to him ; defendant's qualifications as assistant postmaster ; demand before entry and full notice to plaintiff of the facts and claims ; and that he came after his own mail matter among other things.

Mr. Carpenter and H. & G. A. Bingham, for plaintiff.

H. Hibbard, for defendant.

FOSTER, J. The questions to be considered in this case are all presented by the demurrer to the plea of the general issue and to second special plea, which comprehends all the facts relied upon by

Sterling v. Warden.

the defendant as a justification for the trespass alleged. The other pleas vary from this only in the omission of certain allegations of fact contained in the second plea,—except that in the seventh plea there is an allegation that the plaintiff “then and there had notice” of the appointment and qualification of Gilchrist and the defendant as postmaster and assistant postmaster, omitting the allegation contained in the second plea, that Gilchrist informed him “of the facts and matters aforesaid.”

The substance of the defendant's attempted justification is, not merely that, as assistant postmaster, an officer and agent of the United States government,—the agent and servant also of his immediate principal, Gilchrist, the postmaster, an officer and agent of the government,—he committed the acts charged in the declaration, solely and necessarily in pursuance of his right and duty; but, also, that his entry upon the premises and removal of the personal property were justified by the license and permission given by the plaintiff to his principal, Gilchrist, and that the assault upon the plaintiff was committed in self-defense, and was accompanied with no unnecessary force. He also attempts to justify his entry into the building, by insisting upon the right of a citizen to enter a public post-office for the purpose of getting his mail-matter, alleging that he went there for that purpose, making his errand known to the plaintiff.

We will first consider the subject of the license given by the plaintiff to Gilchrist, bearing in mind that, upon demurrer, all the allegations of the defendant are to be regarded as established facts.

It appears, then, that with full notice on the part of the plaintiff of the appointment and qualification of Gilchrist and the defendant as postmaster and assistant postmaster, and special information from Gilchrist that he proposed and intended to go to the post-office room on the thirtieth of July, “and then and there remove and take away therefrom the furniture, articles, and other things belonging to said post-office, and remove the same to another building,” the plaintiff then and there “assented thereto, and gave his consent, license, and permission that said Gilchrist might and should take away and remove said furniture, articles, and things, as aforesaid.” It also appears that the defendant was employed by Gilchrist, and acted under his direction, in the attempt to take possession of and to remove the property, and that his assistance was necessary for this purpose.

It is not needful to consider, in this connection, whether the entry of Gilchrist upon the premises was justifiable *virtute officii*, and under authority in law, whereby a duty being imposed upon a public officer to take possession of public property, such duty could not be performed without an entry upon the premises of the plaintiff; nor whether an implied license may be presumed, from the duty of the plaintiff to the government and its legally appointed agents, under the circumstances of this case (see 2 Bouv. Inst. 562-570, *passim*), which license or authority would extend as well to the defendant, the assistant postmaster, as to Gilchrist, his immediate superior and principal — *Boody v. The United States*, 1 W. & M. 150; because here express license to Gilchrist is averred and established.

The plea alleges that the plaintiff "gave his consent, license, and permission, that said Gilchrist might and should take away and remove" the public property.

"A license is express where, in direct terms, it authorizes the performance of a certain act — as where a man who owns a dam authorizes his neighbor to draw water from it to his mill; in this case the licensee has a right to enter the premises to get the water." 2 Bouv. Inst. 567. A bare parol license, though without consideration, will furnish a justification for an act which would otherwise be a trespass. *Marston v. Gale*, 24 N. H. 177; *Bachelder v. Sanborn*, id. 479; *Rawson v. Morse*, 4 Pick. 127.

Such a license, though ordinarily regarded as personal, extending only to the party to whom it is expressly given, will nevertheless apply to and protect the agents and servants of the licensee, whenever, from the circumstances, it can be presumed that there was an implied license to such persons — "as where a license is given to a man to remove a weighty matter, which requires the assistance of several other persons." 2 Bouv. Inst. 568. A license to a man to remove a bank safe would imply a license to as many servants of the licensee as should be requisite for his assistance. A license necessarily implies the right to do every thing without which the act cannot be done. *Taylor's Land. & Ten.*, § 766; *Curtis v. Galvin*, 1 Allen, 217.

The plea in this case is conclusive upon this fact, and establishes the license to the defendant. It alleges that Gilchrist requested the defendant to assist him, and that "it was necessary and proper, in order that said Gilchrist should be able and have sufficient force conveniently and properly to take away and remove said furniture,

Sterling v. Warden.

articles, and things from said post-office room as aforesaid, that he should then and there be aided and assisted by the defendant."

Undoubtedly a bare license is revocable before it is executed; but there are licenses which are irrevocable, though they relate to an entry upon and the occupation of land or real estate, and are by parol: "as where, for instance, the license is directly connected with the title to personal property which the licensee acquires from the licensor at the time the license is given, whereby the license is coupled with an interest. Thus, when one sells personal chattels on his own land, and, before a reasonable time to remove, forbids the purchaser to enter and take them, it was held to be a license which he could not revoke within such reasonable time. *Nettleton v. Sikes*, 8 Metc. 34; *Wood v. Manley*, 11 Ad. & Ell. 34; *Parsons v. Camp*, 11 Conn. 525; *White v. Elwell*, 48 Me. 360; 1 Washb. Real Prop. *401.

And it is said that a license coupled with an interest is where the party, obtaining a license to do a thing, also requires a right to do it. In such case the authority conferred is not merely a permission; it amounts to a grant, and it may be assigned to a third person. 2 Bouv. Inst. 568.

It is not indispensable to the condition of such a license that the right or title to the property sought to be removed should have been derived from the licensor. The license to enter on the land and remove the property is a license coupled with an interest, and so assignable and irrevocable, if the licensee's right to the possession of the property is derived from another source, provided the party granting the license has assented to the contract or other condition of things whereby the licensee gains the title or the right to the possession of the property. And such assent may be inferred from the duty of the licensor to recognize the contract or circumstances from which the other party's right is derived. A person cannot justify entering the close of another to take his own property, without showing the circumstances under which it came there, even though he alleges he did not do any unnecessary damage (*Anthony v. Haney*s, 8 Bing. 186; 2 Selw. N. P. 1342); "but," says Baron PARKE, "all the old authorities say that where a party places upon his own close the goods of another, he gives to the owner of them an implied license to enter for the purpose of recaption." *Patrick v. Colerick*, 3 M. & W. 483; *Mussey v. Scott*, 32 Vt. 84.

Here, Gilchrist gained his title to the possession and control of

Sterling v. Warden.

the property from the United States. To that possession, right and control the plaintiff expressly assented. And so Gilchrist acquired a license coupled with an interest, although the interest and title were not derived from the plaintiff. And, as instances of the effect of a license, VAUGHAN, C. J., in *Thomas v. Sorrell*, Vaughan's Rep. 831, says: "A dispensation or license properly passeth no interest, nor alters nor transfers property in any thing, but only makes an action lawful which, without it, had been unlawful: as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away deer killed to his own use; to cut down a tree in a man's ground, and carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree; but as to the carrying away the deer killed and tree cut down, *they are grants*. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licenses; but it is consequently necessary to those actions that my property may be destroyed in the meat eaten and in the wood burnt. So, as in some cases by consequent, and not directly and as its effect, a dispensation or license may destroy and alter my property."

And Baron ALDERSON, in *Wood v. Leadbitter*, 13 M. & W. 843, says: "A mere license is revocable; but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot, in general, revoke it so as to defeat his grant, to which it was incident."

In *Wood v. Manley*, 11 Ad. & Ell. 34, it appeared that goods which were upon the plaintiff's land were sold to the defendant, and that by the conditions of the sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods. It was held that, after the sale, the plaintiff could not countermand the license. And the defendant having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and license and a peaceable entry to take, to which the plaintiff replied *de injuria*,—it was held that the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter; and the defendant had broken down the gates, and entered to take the

Sterling v. Warden.

goods—"the plaintiff," as was said by WILLIAMS, J., "having assented to the terms of the contract, put himself into a situation from which he could not withdraw."

It is not necessary, as before remarked, that an authority in law to enter into the post-office and take the public property, by an agent of the government duly authorized for that purpose, should be shown, or presumed, from the circumstances of the case, although perhaps such authority and right, and the means of exercising it, would be a fair legal conclusion. The assent, license, and permission to enter and take the goods is express in this case; and if the authority of a purchaser of goods from the vendor, having license to enter and remove them, becomes an authority coupled with an interest irrevocable and assignable, *a fortiori*, it would seem that a license freely given by the party who never had any property in the goods, and whose right to the possession had been terminated by his removal from office—a license given to his successor in office, entitled by law to the possession of the property—could not be regarded as a license of more restricted character. Under the defendant's plea, he may prove a license in law or in fact, express or implied. 4 Bouv Inst. 57.

Moreover, the pleas allege no revocation, in terms nor by implication, of the license to Gilchrist; and we have seen that such license, by necessary consequence, implies a license to employ such agents, servants, and assistance as may be requisite to make the license effectual.

If it be said that the licenser may reasonably object to the entry and removal of goods by such a servant of the licensee as may happen to be personally obnoxious for any reason to the former, it is sufficient to say that no such objection is suggested by the pleadings; and on demurrer, such excuse for an attempted revocation is not open to the plaintiff. If the plaintiff relied upon such grounds, the defendant having pleaded a license coëxtensive with all the allegations of trespass, the plaintiff was bound to answer by replication or new assignment, or else stand concluded by his demurrer. 1 Chitty's Pl. *624-637, *passim*.

Another important consideration is suggested by the pleadings. It is shown that "when the defendant arrived at said post-office building as aforesaid, and during all the time when he was in and about said building and room, as is hereinafter set forth, said Gilchrist was in and about said building and room for the purpose, and

was engaged in the work and business, of taking away and removing said furniture, articles, and things as aforesaid."

So that it would seem that when the defendant entered the building, the plaintiff, regardful as well of his duty as his license, had abandoned the possession and control of the goods to Gilchrist, and that the license therefore had been substantially executed; and a license executed is not countermandable. *Liggins v. Ince*, 7 Bing. 682.

But the first count in the plaintiff's declaration is an action of trespass *quare clausum*, and the gist of it lies in the injury to the possession — *Brown v. Manter*, 22 N. H. 472 — the subsequent assault, if unjustifiable, being mere matter of aggravation. *Brown v. Manter*, ante; *Chellis v. Stearns*, 22 N. H. 315; *Ferrin v. Simonds*, 11 id. 363; *Taylor v. Cole*, 3 Term, 292. And if the right of entry is shown, the action, so far as it rests upon the first count, fails entirely, and the plaintiff cannot recover upon proof of the subsequent assault merely.

Where the authority or license to enter and do certain things is given by the party, there, although the person to whom the authority is given may, by the commission of subsequent acts, be a trespasser, yet such subsequent acts will not affect the original entry so as to make that which was sanctioned by the party complaining a trespass; but the subsequent acts only will amount to trespasses. 2 Selw. N. P. 1342; *Wendell v. Johnson*, 8 N. H. 220.

In *Kingsbury v. Pond*, 3 N. H. 513, it is said to be "a well-settled principle of law that, in trespass *quare clausum fregit*, a justification of the entry will cover the whole declaration," the court in this case adopting the argument of Ch. J. PARKER, who cited 1 Str. 61 — Yelv. 126; 2 Salk. 642; and the court cited *Taylor v. Cole*, ante.

A person entering by license of the party may so abuse that license as to make himself liable for that abuse by some appropriate action — as, for example, if the license in this case had extended only to permission to enter without the right to remove the goods, the party might have been liable in trespass *de bonis* for the removal of the goods; or, if necessary force and aggression were employed, he might be held liable in trespass for an assault; but in neither case would he be liable in trespass *quare clausum*. *Sampson v. Henry*, 13 Pick. 36; *Mugford v. Richardson*, 6 Allen, 76; *Winter v. Stevens*, 9 id. 525, 530; *Merriam v. Willis*, 10 id. 118. In *Taylor v. Cole*, Mr. Justice BULLER says: "The first count is for breaking, entering, and

Sterling v. Warden.

expelling; the plea only justifies the breaking and entering, showing a good cause for it: and that is a full answer to the first count; for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation. If the plaintiff had wished to take advantage of the expulsion, he should have shown the special matter in a new assignment, for, according to the *Six Carpenters' case*, he should show in reply that which makes the party a trespasser *ab initio*.

The pleadings disclose yet another answer to the plaintiff's claim.

It appears that the building and room which the defendant entered was a building which, though connected with the plaintiff's dwelling-house by a side door, had also a separate outside door which was ordinarily used for passage into and out of said office. It was at this door, and no other, that the defendant applied for admission, and entered. "Said building and room were then and there being used, solely and exclusively, for the purposes and business of said post-office, and always had been so used since the erection of the building." In the second, seventh, and tenth pleas it is alleged that "when the defendant first arrived at said door of said post-office building as aforesaid, and immediately before said assaulting, beating, and ill-treating of him by the plaintiff and his said wife, that he notified and informed the plaintiff and his said wife that he came there with and for the purpose of getting and obtaining any mail-matter which might then and there be in said post-office for him, the said defendant."

The demurrer admits the defendant's declaration of purpose and intent, and the truth of it.

Is not this a complete answer to the charge of breaking and entering? If such facts do not warrant the conclusion of law that the party might lawfully, and against the consent of the plaintiff, enter the building for the purpose indicated, can there be any doubt that they furnish abundant evidence of an implied license by the party, a license coupled with an interest and not revocable?

We think the public would be surprised to learn that any citizen has not a right to enter the post-office at all seasonable hours, and in a peaceable manner, for the purpose of getting his mail-matter.

If a man may justify entering into an inn or public house without the leave of the owner first specially asked, because, when a man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors. 3 Bl. Com. 212;

Markham v. Brown, 8 N. H. 523. If a man who keeps a store for the sale of merchandise is presumed to license all persons to enter who come there for lawful purposes; if the same presumption arises in all cases where a person expects or invites persons to come and deal with him, let his business be what it may (2 Bouv. Inst. 568), much more may any person justify his entrance into the place appointed and provided by the government, at the public expense, and without charge to the citizen, for the transaction of all business connected with the postal service of the country.

Upon the case presented by the pleadings, it would seem to be unnecessary to pass upon the main question considered by counsel in argument; but as the suggestions presented to our view may become of practical importance upon a future trial of the cause, we have considered them, and are prepared to express the opinion of the court upon the case in the aspect in which it has been mainly regarded in the argument.

The defendant contends that, independent of any express or implied license to himself or his superior, he had the right to enter the post-office by force, if necessary, and against the will of the plaintiff, for the purpose of removing the public property, to the custody of which he was entitled *virtute officii*, and to resist by force sufficient for the purpose the effort of the plaintiff and his wife to prevent the acquisition of the property.

If the defendant is unquestionably entitled to the immediate possession of the public property, and the plaintiff retains that possession without pretense of right, as in this case, must the defendant resort to legal process and submit to its inevitable delay and expense? or may he, by summary proceeding, without unnecessary force, assert his rights, and, by entry upon the premises of the plaintiff, take possession of the property wrongfully withholden from him?

It is said that the law does not permit a man to assert his own rights or to redress his own wrongs by force, and as a general principle the proposition is sound and wholesome; but we think it is not always to be asserted and maintained, rigorously and without qualification.

The relative positions of the plaintiff and Gilchrist, or the defendant, his servant, were not those of landlord and tenant at the period of the expiration of the tenancy, but it was so far similar that a strong analogy is presented between the form and substance of the defendant's pleas in this case and the plea of *liberum tenementum*,

Sterling v. Warden.

which gives the plaintiff apparent color. This plea, like that, admits a sufficient possession in the plaintiff to support an action against a wrong-doer, but denies the plaintiff's rightful possession as against the defendant, and asserts a right in the defendant to immediate entry and possession for the purpose of taking the goods, to the possession of which the defendant was entitled. 2 Saund. Pl. & Ev. 1101; Steph. Pl. 316; *Doe v. Wright*, 10 Ad. & E. 768.

It is clearly the English law, and, as we believe, the strongly preponderating opinion of the American courts, that no civil action lies against a landlord for regaining with force the possession of the demised premises, unless there is an excess of force, and then only for such excess.

It has been remarked that "A tenant whose right to possession is determined either by the expiration of his term, by forfeiture, or by notice to quit, and who is, therefore, a tenant at sufferance, and himself a wrong-doer, may yet treat his lessor, who is entitled to immediate possession, as a trespasser, and, relying on his right, maintain trespass *quare clausum* against him, merely because the right of the latter has been forcibly asserted, seems so extraordinary a proposition, that if not warranted by express words of the statutes, nothing but the clearest implication from their language could justify it; and, as the removal of the tenant upon or after entry is but a part of the act of entry, and depends on the legality of the possession thereby gained for its justification, the action for assault or for removal of the tenant's goods must stand or fall with the action of trespass *quare clausum*." 4 Am. Law Rev. 430.

The statutes of forcible entry and detainer in England, and in those of the United States where they still prevail, invariably specify the penalty incurred; and these statutes, and proceedings under them, in no way affect the civil character of the act of forcible entry, nor is any civil or common-law liability to be implied from them.

In *Turner v. Meymott*, 1 Bing. 158, where the landlord, on the determination of a tenancy at will, broke into the house with a crow-bar, the tenant being absent, but having left furniture in the house and resumed possession—the court said—"It must be admitted that [the landlord] had a right to take possession in some way. If he had used force, that is an offense in itself, but an offense against the public for which, if he has done wrong, he may be in-

dicted." And the court set aside the verdict against the landlord in the action of trespass *quare clausum*.

This case is indorsed and approved in *Mussey v. Scott*, 32 Vt. 84, where BENNETT, J., says — "In the case of personal property, the party injured may have redress by his mere act, by what is termed recaption, though this must not be done in a riotous manner, or attended with a breach of the peace."

In *Taylor v. Cole*, 3 T. R. 292, the principle seems to be clearly intimated, if not in terms expressed, that a legal possession can be acquired by an entry, though made with such force as to be punishable under the statutes of forcible entry and detainer. In delivering the opinion of the court, Lord KENYON said — "It is true that persons having only a right, are not to assert that right by force; if any violence be used, it becomes the subject of a criminal prosecution; and that is the amount of the case cited from Shower, which was a proceeding under the statute for a forcible entry. (The case referred to is *Rex v. Deane*, 2 Show. 85.) But this is not a criminal prosecution; and the question is, whether a person having a right of possession may not peaceably assert it, if he do not transgress the laws of his country. I think he may; for a person who has a right of entry may enter peaceably, and being in possession, may retain it, and plead that it is his soil and freehold." And in the same case, Judge ASHURST, a "careful expounder of the law," said — "No person who has a right of entry into lands can be considered as a trespasser for asserting that right, unless it be attended with such acts of violence as will subject him to a criminal prosecution."

BULLER and GROSE, Judges, concurred.

In *Taunton v. Costar*, 7 Term Rep. 432, the head-note is — "A tenant, holding over after the expiration of his term, cannot distrain his landlord's cattle, which were put upon the premises by way of taking possession."

In this case Lord KENYON says — "The case is too plain for argument. Here is a tenant from year to year, whose term expired upon a proper notice to quit; and because he holds over in defiance of law and justice, he now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear that the landlord could have justified under the plea of *liberum tenementum*. If indeed the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his

Sterling v. Warden.

right to enter upon the land at the expiration of the term. There is not the slightest pretense for considering him as a trespasser in this case."

And again, Lord KENYON remarked, in *Argent v. Durrant*, 8 T. R. 403 — "In trespass, the defendant pleaded not guilty; and if he might give in evidence that at the time of the trespass the freehold was in such a one, and he, as his servant and by his command, entered, was the question: and it was said, by Coke, that the same might be so well enough," — citing 1 Leon. 301.

And see to the same effect *Dodd v. Kyffin*, 7 T. R. 354; *Bartholomew v. Ireland*, Andrews, 108.

In Gilbert's Ev. 258, it is said — "In trespass, on not guilty, the defendant may give in evidence that the right of freehold was in J. S., and that he by his command entered; for if the defendant entered by the command of J. S., it is the same as if J. S. entered, and consequently, if J. S. hath the right, the estate is vested in him by the entry, and consequently the defendant is no trespasser on the plaintiff."

In *Harvey v. Brydges*, 14 M. & W. 437, PARKE, B., lays down the law in these terms: "Where a breach of the peace has been committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification, that the plaintiff was in possession of the land against the will of the defendant, who was the owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." ALDERSON, B., concurred.

And this doctrine has been fully confirmed in *Blades v. Higgs*, 10 C. B. N. S. 713. See, also, *Pollen v. Brewer*, 7 id. 371; *Davison v. Wilson*, 11 Ad. and E. N. S., 890 (63 Eng. Com. Law); *Burling v. Reid*, id. 905; *Davis v. Burrell*, 10 C. B. 821; *Patrick v. Cole-
rick*, 3 M. & W. 483.

The result of English authority then is, that an entry by the landlord with force is legal only to the extent of the penalties provided by the statute of forcible entry and detainer, or other criminal process, and that no right of common-law action by the tenant is to be inferred from the statutory prohibition.

If we turn now to the American cases, we shall find the law, as

Sterling v. Warden.

indicated by the English authorities, even more strongly and unequivocally maintained. Such is the purport of the decisions, without disturbance to the current, setting in one direction, in the States of Massachusetts, New York, Pennsylvania, North Carolina, South Carolina, New Jersey, Kentucky, Missouri, and probably in some other jurisdictions. And in our own State, although the subject does not seem to have been largely discussed (perhaps because the principle has been regarded as too firmly established to admit of serious question), the authorities point unmistakably in the same direction. See *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Hyatt v. Wood*, 4 Johns. 150; *The People v. Leonard*, 11 id. 504; *Ives v. Ives*, 13 id. 235; *Jackson v. Morse*, 16 id. 197; *Erwin v. Olmstead*, 7 Cow. 229; *Jackson v. Farmer*, 9 Wend. 201; *The People v. Van Nostrand*, id. 50; *Livingston v. Tanner*, 14 N. Y. 64; *The People v. Field*, 52 Barb. 198; S. C., 1 Lansing, 242; *Kellam v. Janson*, 17 Penn. St. 467; *Zell v. Ream*, 31 id. 304; *Overdeen v. Lewis*, 1 W. & S. 90; *Johanson v. Hannahun*, 1 Strob. 313; *Walton v. File*, 1 Dev. & B. 567; *Tribble v. Frame*, 7 J. J. Marsh. 599; *Beecher v. Parmele*, 9 Vt. 352; *Yale v. Seely*, 15 id. 221; *Hodgeden v. Hubbard*, 18 id. 504; *Mussey v. Scott*, 32 id. 82; *Todd v. Jackson*, 2 Dutch. 525; *Krevet v. Meyer*, 24 Mo. 107; *Fuhr v. Dean*, 26 id. 116; *Rawson v. Morse*, 4 Pick. 127; *Sampson v. Henry*, 13 id. 36; *Meador v. Stone*, 7 Metc. 171; *Miner v. Stevens*, 1 Cush. 485; *Mugford v. Richardson*, 6 Allen, 76; *Hilbourne v. Fogg*, 99 Mass. 11; *Curtis v. Galvin*, 1 Allen, 215; *Moore v. Mason*, id. 406; *Winter v. Stevens*, 9 id. 526; *Merriam v. Willis*, 10 id. 118; *Pratt v. Farmer*, id. 519; *Morrill v. De la Granja*, 99 Mass. 383; *Brown v. Cram*, 1 N. H. 169; *Kingsbury v. Pond*, 3 id. 511; *Ferrin v. Symonds*, 11 id. 365; *Chellis v. Stearns*, 22 id. 315; *Forsyth v. Morse*, Rockingham, June, 1870, not yet reported; and see Taylor's Landlord and Tenant, § 782; 1 Washb. R. P. 540, 541.

In *Hyatt v. Wood*, 4 Johns. 150, it is held that "if a person having a legal right of entry on land enters *by force*, though he may be indicted for a breach of the peace, yet he is not liable to a private action of trespass for damages at the suit of the person who has no right and is turned out of possession," SPENCER, J., saying: "It may be laid down as an axiom, that no man can recover upon a claim of right to property against another whose rights to the subject-matter are superior to those of the person so claiming damages for a violation of his supposed rights. At common law, and prior

Sterling v. Warden.

to the statutes to prevent forcible entries, wherever a right of entry existed the disseisee might lawfully regain the possession by force. 2 Hawk. P. C., ch. 64. In a case bearing analogy to the present, of personal property, the right of recaption exists, with the caution that it be not exercised riotously or by a breach of the peace; for should these accompany the act the party would then be answerable criminally; but the riot or force would not confer a right on a person who had none, nor would they subject the owner of the chattel to a restoration of it to one who was not the owner."

Hawkins, cited above, is thus (2 P. C., ch. 64, p. 29): "He who is wrongfully dispossessed of his goods may justify the retaking of them by force from the wrong-doer, if he refuse to deliver them; for the violence which happens through the resistance of the wrongful possessor being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought."

In *Jackson v. Farmer*, 9 Wend. 201, NELSON, J., after declaring the principle as asserted in *Hyatt v. Wood*, and affirmed in *Ives v. Ives*, says: "This opinion, apparently harsh and tending to the public disturbance and individual conflict, is abundantly supported by authority, and must be considered the law of the land,"—citing 3 Bl. Com. 5, 174; 1 Hawk. 274; 7 T. R. 43, etc., etc. He continues: "It was the abuse of this summary power to right one's self by entry, where the right of entry existed, which gave rise to the numerous English statutes against forcible entry and detainer, of which our old act was substantially a copy; and in these acts and the common-law remedy by indictment are to be found the only protection of the party thus forcibly dispossessed. They punish certainly the force, and in some cases make restitution of the possession; but so far as the civil remedy is concerned, there is none but what is afforded by those acts."

The New York Revised Statutes provide that no entry shall be made into any lands or other possessions but in cases where entry is given by law; and in such case in a peaceable manner, not with a strong hand or multitude of people." Commenting upon this statute, MORGAN, J., in the very recent case of *The People v. Fields*, 1 Lans. 242, says: "In some few cases judges have advanced the doctrine that any entry, even by the person entitled to the possession, is unlawful, if made against the will of the party in possession. Such a view of the statute is clearly contrary to the decisions of our

own courts and to the policy of the law. See 1 Washb. R. P. 540. Our statutes do not interfere with the common-law right of justifying, in an action of trespass *quare clausum fregit*, even a forcible entry."

The Vermont cases may seem to be somewhat conflicting. In *Beecher v. Parmele*, 9 Vt. 352, REDFIELD, J., says: "It is now well settled that an intruder * * in quiet possession of land, * * may be forcibly expelled by the owner, * * so far as the land is concerned. If the owner is guilty of a breach of the peace and trespass on the person of the intruder, he is liable for that, *but his possession is lawful*;" and trespass was not held to lie against him. And to the same effect is *Yale v. Seely*, 15 Vt. 221, and *Hodgden v. Hubbard*, 18 id. 504.

But in *Dustin v. Cowdry*, 23 Vt. 631, the court held a different doctrine, placing the decision upon the authority of the then recent decisions of *Newton v. Harland*, 1 M. & G. 644, and *Hillary v. Gay*, 6 C. & P. 284, the court, after a full consideration of these cases, remarking: "This is the latest declaration of the courts of Westminster Hall upon this subject. * * We have no disposition to add any thing in regard to the true construction of law as derived from the decisions of the courts of Westminster Hall, and we think the decisions of the English courts as to the common law or the construction of ancient statutes are to be regarded of paramount authority."

Now, concerning these English cases — *Hillary v. Gay* and *Newton v. Harland* (the only two English cases which seem to be in opposition to the otherwise uniform current of English authority) — it is sufficient to remark that, in the latter case, ALDERSON, B., dissenting from the opinion of the majority of the court, denied the authority of the former *nisi prius* decision, which was subsequently disowned in *Harvey v. Brydges*, 14 M. & W. 437; that the authority of *Newton v. Harland* was "much questioned" by CRESWELL, J., in *Davis v. Burrell*, 10 C. B. 825; substantially overruled in *Pollen v. Brewer*, 7 C. B. (N. S.) 373 (opinion by EARL, C. J.); and that the supposed authority of both cases, shaken as we have seen by the subsequent English cases, was expressly rejected in the comparatively recent case of *Blades v. Higgs*, 10 C. B. (N. S.) 713.

And, therefore, regardful still, and properly so, of the "paramount authority" of the English decisions as to the common law the court in Vermont came at last to the conclusion, in *Mussey v.*

Sterling v. Warden.

Scot., before referred to, that where a landlord, having a right of entry, violently broke into the premises during the temporary absence of the tenant, he was considered nevertheless to have acquired a lawful possession thereby, which he might defend by force against the tenant; thereby substantially overruling its previous decision in *Dustin v. Cowdry*. If the court in Vermont has in a still more recent case (*Whittaker v. Perry*, 38 Vt. 107) reaffirmed the doctrine of *Dustin v. Cowdry*, its respect for the authority of Westminster Hall would seem to be diminished, unless, as it occurs to us, the earlier and later cases in that State may, upon a careful examination of the facts in the several cases, be found, after all, not to be seriously conflicting, nor, upon the whole, opposed to the general course of English and American authority. So it will be found on examination that some of the earlier Massachusetts decisions are founded upon the supposed authority of the exploded cases of *Hillary v. Gray* and *Newton v. Harland*; while the latter cases in that State are in full accordance with the modern doctrine.

Perhaps this remark applies only to the first reported case of *Sampson v. Henry*, 11 Pick. 379, where Mr. Justice WILDE lays down the broad proposition that "the law does not allow any one to break the peace and forcibly to redress his private wrongs. He may make use of force to defend his lawful possession; but, being dispossessed, he has no right to recover possession by force and by a breach of the peace." — a proposition not very objectionable in the abstract, but which is not always to be received in its unrestricted terms and without qualification. It was a mere dictum of the learned judge, not called for by the case, which was trespass for an assault, in which the defendant claimed the right, as stated in the opinion of the court, "not only of breaking open the house and entering therein with force and violence, but also of committing an assault with a dangerous weapon;" and the real purport and substance of the decision is all that the case called for, namely, that inasmuch as improper force was used, trespass for an assault lay. In the same case, 13 Pick. 36, it was expressly held that trespass *quare clausum* did not lie.

In *Minor v. Stevens*, 1 Cush. 482, Judge WILDE cites with approval those English and New York cases which hold that possession may be regained by force, and that trespass *quare clausum* will not lie in such a case, and declares this to be the law of Massachusetts, notwithstanding the statute against forcible entry and detainer. To

the same effect is *Curtis v. Galvin*, 1 Allen, 215, and *Moore v. Mason*, id. 406, in both which cases the entry was forcible; and in *Winter v. Stevens*, 9 Allen, 526, where the entry was made by the owner, accompanied by five men, the tenant being ejected by force, BIGELOW, C. J., says the tenant "was liable to be ejected by force, if it was used reasonably, without committing a breach of the peace, and was not disproportionate to the exigency."

In *Meador v. Stone*, 7 Metc. 151, where the defendant broke out a pane of glass, unfastened the window on the inside, and effected an entrance, and then carried off doors and windows, the tenant being in actual possession, SHAW, C. J., says — "However such entry by force might subject the landlord to penalties for a breach of the law criminally, it confers no right of action on the tenant thus holding without any right of possession." To the same general tenor and effect are all the Massachusetts cases before referred to.

In the cases cited from the Missouri Reports, it is held that although the ousted tenant may, in some cases, have a remedy by statutory process of restitution, he cannot maintain trespass against the landlord.

In *Brown v. Cram*, 1 N. H. 171, it is held that a mortgagor in possession is merely the tenant at sufferance of the mortgagee, who, unless expressly restrained by the provisions of the deed, may at his pleasure enter and thereby put an end to such tenancy, BELL, J., saying — "It was contended on the part of the defendant that the mortgagee, under whom the plaintiffs claim, entered forcibly and unlawfully; but it is unnecessary to determine that fact, for it is clear that if a person having a right of possession resort to force to obtain possession, the law considers such possession as rightful, although it will punish him in a criminal prosecution for the violation of the public peace by which he obtained it" — citing *Taunton v. Costar* and *Hyatt v. Wood*. To the same effect is *Chellis v. Stearns*, before cited.

The English case (*Blades v. Higgs*, 10 C. B. N. S. 713) bears a stronger resemblance to the present case than does any other that has fallen under our observation, and, because of its pertinency to the present discussion, we quote the opinion by EARLE, C. J., in full — premising that counsel, in argument, had reviewed at length the English decisions to which reference has now been made: — "The declaration in this case was for an assault and battery. The substance of the justification was, that the plaintiff, having wrong-

Sterling v. Warden.

fully in his possession rabbits belonging to the defendants (we consider the servants here the same as the master), and being about to carry them away, the defendants requested him to refrain, and, on his refusal, *molliter manus imposuerunt*, and used no more force than was necessary to take the rabbits from him. To this the plaintiff has demurred, and thereby admits that he was doing the wrong, and that the defendants were maintaining the right, as alleged; and he contends that the defendants are not justified in using necessary force, on account of the danger to the public peace; but he adduces no authority to support his contention. The defendants, likewise, have failed to adduce any case where the justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgment decisive to show that the plea is good, although that allegation is not made. If the defendants had actual possession of the chattels, and the plaintiff took them from them against their will, it is not disputed that the defendants might justify using the force sufficient to defend their right and retake the chattels; and we think there is no substantial distinction between that case and the present; for, if the defendants were the owners of the chattels, and entitled to the possession of them, and the plaintiff wrongfully detained them from them after request, the defendants, in law, would have the possession, and the plaintiff's wrongful detention against the request of the defendants would be the same violation of the right of property as the taking of the chattels out of the actual possession of the owner.

"It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom.

"In respect of land, as well as chattels, the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified. See *Newton v. Harland*, 1 M. & G. 644. But in respect of land, that argument has been overruled in *Harvey v. Brydges*, 14 M. & W. 442. [The learned judge then repeats the language of PARKE, B., already quoted in this opinion.]

"In our opinion, all that is so said of the right of property in land applies, in principle, to a right of property in a chattel, and

Sterling v. Warden.

supports the present justification. If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it. For these reasons, our judgment is for the defendants."

And see Hilliard on Remedies for Torts, 207; 2 Selw. N. P. 1328; 4 Bouv. Inst. 37; Taylor's L. & T., § 782, where it is said: "As to a tenant at will, or by sufferance, although he may maintain trespass against a wrong-doer, he cannot against his landlord, even if violently dispossessed; for an entry by the landlord determines his tenancy."

Prof. Washburn (1 Real Prop. *395-*397) reviews at some length the English and American cases, remarking that "the law, as generally adopted in the United States, may be assumed to be substantially as laid down by Baron PARKE," in *Harvey v. Brydges*, and sums up as follows: "Upon a review of all these cases, the weight of authority seems to be in favor of the common-law right of the owner of land to recover possession of his premises by force, of which another is wrongfully in possession, provided no more is employed than becomes necessary by the resistance interposed by the tenant to prevent his regaining possession peaceably, especially if his entry be peaceable."

And to this conclusion we are inclined to subscribe, regarding it as founded upon reason as well as authority.

We think it will be found, upon a careful examination of the cases, that the opposite conclusion reached by some judges in earlier times, rests mainly upon a ground not available in this State, namely, that the statutes of forcible entry and detainer have, by implication, superseded and forbidden the summary remedy afforded and justified by the common law.

Since the repeal of our statute forbidding forcible entries, no such implication can be suggested by the plaintiff here. On the contrary, the argument, if any is to be drawn from the repeal of the statute, would seem to be that the rights of parties to redress by entry is to be regarded as sustained by the principles of the common law.

With regard to the second and third counts, which charge an assault merely, without alleging a breaking of the plaintiff's close, if the plaintiff's possession was unlawful, and the defendant had the right of possession, it follows, upon the principles before stated, that

Sterling v. Warden.

either by reason of license, express or implied, or by force of the defendant's right of possession of the chattels, the defendant, having entered upon the premises, would be justified in taking by force, if necessary, the property improperly withholden, and in resisting, by force sufficient for the purpose, the attempted retention of the property by the plaintiff or his wife.

The circumstances of the present case, however, are much stronger in favor of the defendant's justification than those of any case to which we have adverted by way of illustration and analogy.

The demurrer admits that the plaintiff, having been removed from office, had no right to retain the custody of the property belonging to the government; that Gilchrist, having been appointed to the office, had the right to the custody and control of the property; that it was necessary, in order to the removal of the property to the new post-office, that Gilchrist should avail himself of the assistance of his servant, the defendant.

The property was wrongfully detained by the plaintiff. It was public property. The plaintiff was but the custodian and agent of the government, holding the public property by the mere acquiescence of the government, whose prohibition of such retention of the property and right of supreme control is indicated by the appointment of Gilchrist as its agent in the place of the plaintiff. Says BELL, J., in *Chellis v. Stearns*, "It is on the presumed assent of the mortgagee that the mortgagor shall occupy the premises" * * * "so long as the mortgagee acquiesces, without any entry or prohibition, that it is held no action of trespass can be maintained for such occupation."

Gilchrist was the agent of the government and the representative of the public, asserting the rights of his principals, as he was bound to do. His authority was not a mere incident to his office, nor an implication from public necessity, but it was expressly conferred by the same statutes which prescribe the duties of the retiring postmaster.

"Every postmaster shall keep an office in which one or more persons shall attend on every day on which a mail shall arrive," * * * "for the purpose of performing the duties thereof; and it shall be the duty of the postmaster, at all seasonable hours, on every day of the week, to deliver, on demand, any letter, paper or packet to the person entitled to, or authorized to receive, the same." 4 U. S. Statutes, 105. .

Sterling v. Warden.

"Every postmaster shall keep a record in his office of all postage-stamps and envelopes, and of all postal books, blanks, or property received from his predecessor in office, or from the post-office department, or from any of its agents, etc., etc.; and these records shall be preserved and delivered over to his successor in office," etc., etc. 12 U. S. Stat. 702, act of March 3, 1863, § 4.

The postmaster-general is authorized to make all needful rules and regulations for the conduct of the postal service of the country (5 U. S. Stat. 80), and these regulations have the force and effect of positive law. *United States v. Roberts*, 9 How. 501.

Gilchrist had been appointed postmaster, and, as well as the defendant, his assistant, had taken the oath of office; and it is to be presumed that they had complied with all the requirements of law pertaining to their official duties and rights. *United States v. Bachelder*, 2 Gall. 15; *Ronkendorff v. Taylor*, 4 Pet. 349. No particular form of removal of a postmaster is prescribed. If the incumbent have notice that he has been removed and another appointed, and the appointing power in fact make such appointment and recognize the appointee as the legal officer, it is sufficient. *Ex Parte Hennen*, 13 Pet. 230.

Upon the appointment of a postmaster and the execution of his bond, taking the oath of office and receiving his commission (all which formalities are to be presumed from the fact that he acts in an official character, with the recognition of the proper department (*Ronkendorff v. Taylor*, before cited), "he is authorized to take charge of the office." Reg. of the P. O. Dept. (promulgated March 1, 1866), § 2.

"All instructions, circulars and orders received by a postmaster from any officer of the department are to be filed in the office and turned over to his successor. In like manner he will turn over to his successor * * * as public property, all desks, cases and other furniture and fixtures, and all books, maps, blanks, stationery, and other articles which have either been furnished to him as postmaster, or have been charged and allowed at any time, and which may remain on hand when the vacancy or discontinuance occurs." Regulations, § 31.

It is apparent, therefore, that Gilchrist and his agent had the right by law to demand and receive this property, and that the defendant, by refusal to deliver it on demand, became a wrong-doer.

This action is trespass *quare clausum*. The gist of the action is

Sterling v. Warden.

the violation of the plaintiff's possession. If the defendant was justified in entering on the premises, the suit cannot be maintained. *Wendell v. Johnson*, 8 N. H. 222. The plaintiff must prove such a lawful possession as the defendant has no right to disturb. *Inhabitants of Dunstable v. Thacher*, 3 Metc. 242.

The defendant entered for a lawful purpose upon premises to which the public at all seasonable times had the right of access.

The postmaster, the defendant, was required by law to keep an office for the accommodation of, and open to, the public. Although the title to the land may have been in the plaintiff, the post-office department was dedicated by him to public uses, as required by law, and "was then and there being used solely and exclusively for the purposes and business of a post-office." It was, *pro tempore*, not the plaintiff's close; but it was a public place, and by the very nature of the business to which it was appropriated, every person having official transactions with the acting postmaster, or who has any interest in the property under his charge is in legal contemplation, licensed to go into the office. *Burnett v. The State*, 30 Ala. 19; 1 Bishop's Crim. Law, § 316. The post-office establishment is created for public convenience, and the government, by its agents, "have the management and control of the whole concern." Story's Bailments, § 462.

The entry of the defendant, then, as the servant of Gilchrist, being warranted by law and attended with no unnecessary force, was not a trespass. 2 Selw. N. P. 1328.

In a case like the present, it would seem that considerations of public policy, not to say necessity, do not require that a postmaster should be compelled to resort to the dilatory process of a mandamus, or an information in the nature of a *quo warranto*, in order to obtain the custody of public property to the retention of which the plaintiff had no pretense of right.

Our conclusion is that the plaintiff's justification is good, and
The demurrer must be overruled.

LEONARD V. PUTNAM.

(51 N. H. 347.)

Guardians — rights and powers of local.

Where plaintiff, an infant, brought suit by his guardian appointed in another State against the administrator of his father; *Held*, (1) that the rights and powers of guardians do not extend over the persons and property of their wards in other States; (2) that the domicile of the deceased is the place of primary and exclusive probate jurisdiction in the settlement of his estate.

ASSUMPSIT by Henry Leonard, an infant, by his guardian George W. Fisher against George F. Putnam, administrator of Henry D. Leonard, late of Haverhill, N. H., deceased, father of the plaintiff, to recover a sum of money in the hands of the defendant as such administrator.

Defendant was appointed administrator by the judge of probate for the county of Grafton where Haverhill is situated. Plaintiff and his guardian both reside in Franklin county, N. Y., where said guardian was appointed. It was admitted that said guardian had made due demand before suit, and that plaintiff was entitled to recover if upon the facts his guardian was legally entitled to demand and receive the money for the plaintiff.

H. & G. A. Bingham, for plaintiff.

Putnam & Felton, for defendant.

FOSTER, J. In *Taylor v. Barron*, 35 N. H. 495, BELL, J., said — “In this country it is settled by many decisions, that our courts take no notice of a foreign administration, as conferring the right to sue or defend as executor or administrator; and before either can be recognized as the personal representative of the deceased, he must be clothed with authority from the laws of the State in whose courts he desires to appear. Administration only extends to the assets of the intestate within the State where it is granted.” In support of this proposition he cites numerous authorities of many State tribunals, as well as of the Federal courts—among them the case of *Sabin v. Gilman*, decided in 1818, 1 N. H. 193, which is clear and decisive to the same point.

Leonard v. Putnam.

The legal principle established by these and other cases, and the ground upon which they are based, is, that there is no privity between administrators, or any other officers or parties connected with the administration of estates, deriving their authority under different governments; and it seems to be founded in the convenience, not to say necessity, of independent administrations in every State where there is property belonging to the estate, and the independence of such administrations upon each other. 3 Redfield on Wills, 24, n. 7; *Clark v. Clement*, 33 N. H. 563; *Stacy v. Thrasher*, 6 How. 59.

The primary probate jurisdiction of wills, and of every thing pertaining to the settlement of estates, is exclusively in the place of the domicile of the deceased. 3 Redf. Wills, 20. "Of such unqualified extent is this rule, that a will cannot be used as evidence affecting the title of personalty, in any court of common law, until it has been proved and allowed in the probate court." *Strong v. Perkins*, 3 N. H. 517; *Kittredge v. Folsom*, 8 id. 110. And by our laws, "no person shall intermeddle with the estate of any person deceased, or act as administrator thereof, until he has given bond to the judge" of probate. Gen. Stats., ch. 176, § 12. So, also, "all proceedings in relation to the settlement of the estate of a person deceased, or in relation to the property or estate of any person under guardianship, shall be had in the court of probate of the county in which administration was granted, or in which the guardian was appointed." Gen. Stats., ch. 170, §§ 7, 8.

These statutory provisions are indicative of the supposed necessity for the maintenance of a certain, established, and independent jurisdiction of all matters relating to the administration and settlement of estates.

"As a general rule, in the American States," says Mr. Redfield, "the authority of a personal representative is strictly limited to the State from which it is derived. This is in analogy to the practice in the ecclesiastical courts, where the ordinary was held to have no authority beyond the limits of his own diocese, and that consequently he could confer none." 3 Redf. Wills, 24.

And Chancellor KENT says—"The general rule in this country and in England is, that letters testamentary or of administration granted abroad give no authority to sue or be sued in another jurisdiction, though they may be sufficient ground for new probate

authority." 2 Kent's Com. *432, note c; *Tourton v. Flower*, 3 P. Wms. 369.

As to the settlement of estates, the several States are regarded as strictly foreign to each other. *Goodwin v. Jones*, 3 Mass. 514; *Dixon v. Ramsay*, 3 Cranch, 319; *Wood v. Gold*, 4 McL. C. C. 577.

The administrator appointed in one State has no power over the property in another State. *Taylor v. Baron*, before cited; *Goodall v. Marshall*, 11 N. H. 88; *Willard v. Hammond*, 21 id. 385; 2 Kent's Com. 431. He has no interest in debts due there, nor any authority to collect them. *Thompson v. Wilson*, 2 N. H. 291; *Heydock's Appeal*, 7 id. 503; *Taylor v. Barron*, before cited.

There is, therefore, as before stated, no privity between administrators appointed in different jurisdictions. In England and in Ireland administration may be granted in certain archiepiscopal provinces, and in certain "royal peculiars" like the city of London; and if there are *bona notabilia* in each of these jurisdictions, administration must be granted in each. And administration granted in either of these provinces or peculiars is void and inoperative as to any estate of the deceased which is not assets within that jurisdiction. See cases cited in *Taylor v. Barron*, 3 Redf. Wills, 29, n. 16.

Simple contracts and choses in action are assets where the debtors reside. Story's Confl. 425. An administrator, appointed in York, cannot bring *scire facias* in the queen's bench on a judgment which is assets in the province of Canterbury. *Carlise v. Greenwood*, 7 Mod. 15.

Mr. Justice BELL says: "No case has been found in England where an administrator appointed in one province has attempted to bring an action founded on the idea that any privity existed between him and an administrator appointed in another province; nor any case where a defense has been set up on that ground." 35 N. H. 495.

There can be no distinction in principle between the case of non-resident guardians and foreign executors or administrators, with regard to the matter of the present inquiry. See *Commonwealth v. Rhoades*, 37 Penn. St. 60.

And "according to the doctrine of the common law, now fully established both in England and America, the rights of a guardian over all property whatsoever are strictly territorial, and are recognized as having no influence upon such property in other countries or States, where different systems of jurisprudence are established.

Leonard v. Putnam.

No foreign guardian can, *virtute officii*, exercise his functions in another country or State without taking out other letters of guardianship, or otherwise conforming to the local law. Such is the rule in both countries." Schoul. Dom. Rel. 445; Story's Conf. of Laws, § 504; Cooley's Const. Lim. 340.

In *Powers, guardian, v. Mortes* 4 Am. Law Reg. 427, the U. S. circuit court decided that the "authority conferred on a guardian in New York can give him no right to come into Louisiana and take the minor's property there, which is already in the possession of a legal tutrix," the court, McCaleb, J., saying: "It is impossible to perceive upon what solid grounds the claims of the plaintiff in this case can rest. The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators."

And see *Morrell v. Dickey*, 1 Johns. Ch. 153; *Sprague v. Lithberry*, 4 McL. 442.

And Judge STORY (Conf. of Laws, § 504 *a*) uses this language: "No foreign guardian can, *virtute officii*, exercise any rights or powers or functions over the movable property of his ward, which is situated in a different State or country from that in which he has obtained his letters of guardianship. But he must obtain new letters of guardianship from the local tribunals authorized to grant the same, before he can exercise any rights, powers, or functions over the same." "Few decisions upon the point," he says, "are to be found in the English or American authorities, probably because the principle has always been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators."

Mr. STORY, at the time of the publication of the first edition of his "Conflict of Laws," seemed to consider the weight of foreign authority to be in favor of allowing the guardian to assert his claims everywhere, to the same extent as they are acknowledged by the law of the domicile (Story's Conf. of Laws, § 500); and such, says Mr. SCHOULER, seems to be the Scotch doctrine. But the opinion of Judge STORY, with regard to the weight of authority in this respect, became much modified before the publication of the third edition of his "Conflict." See §§ 500 *a* and 504 *a*.

And Mr. Frazer, in his commentaries on the Scotch law of guard-

ian and ward, page 604, while declaring the practice to be to recognize the nomination of executors in a foreign testament, asserts that they must be required to "go through the form of taking out confirmation, at all events, before they can extract decree, in any action raised by them to recover Scotch estate."

It is manifest that the weight of American authority is very strong against the right of the present plaintiff to maintain this action by his guardian, deriving authority solely from the laws of New York.

The indulgence of a liberal comity might authorize us to retain jurisdiction of the present suit, and to permit the infant plaintiff to prosecute it by a guardian appointed by this court, *ad litem*; but we are not inclined to depart from the established practice, founded, as we regard it, upon strong considerations of convenience, uniformity, and certainty, amounting nearly to necessity, and in a sound policy plainly indicated by our laws, in the various and specific provisions enacted for the protection and security of the property and estate of minors, and for the control of those charged with the trust of guardianship. See Gen. Stats., chap. 166; chap. 165, §§ 11-21; chap. 170, § 3.

The plaintiff, in support of his claim to prosecute this suit, invokes the aid of the constitution of the United States, article 4, section 1, which declares that "full faith and credit shall be given in each State to the public, acts, records, and judicial proceedings of every other State."

But it is clear that this provision was not intended to prevent an inquiry into the right of the foreign State to exercise authority over the parties or the subject-matter. The constitution does not confer any new power upon the States, but it intends simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It does not make foreign judgments domestic judgments to all intents and purposes, but only gives a general faith, credit, and validity to them as evidence. Story's Const., chap. 29; Story's Conf. of Laws, § 609; Cooley's Const. Lim. 17, note 1. See *Thurber v. Blackbourne*, 1 N. H. 242; *Hall v. Williams*, 6 Pick. 232.

We have shown that no legal privity exists between the administrator here and the guardian deriving his authority from a foreign government, and it is clearly settled that without such privity no right of action accrues. *Talnage v. Chapel*, 16 Mass. 71; *Aspiden*

Horn v. Cole.

v. *Nixon*, 4 How. 467; *Stacy v. Thrasher*, 6 id. 44; *Taylor v. Barron*, 35 N. H. 498; *Cooley's Const. Lim.* 48, 49.

It may deserve consideration whether the probate court may not, in a judicious exercise of power, direct the payment of the fund in this case into the hands of the foreign guardian. It is suggested that in the exercise of such power the court should take a special bond for the safety of the fund and the due account thereof to the heir, unless the court should be satisfied that the general guardian and his sureties would be responsible for the fund in the State where the appointment of guardian was made. See *Baker v. Andrews' Heirs*, 3 Humph. 592.

It would seem that by such order an administrator would be protected. But this case is not an application to the probate court, and this action cannot be maintained as a matter of right.

HORN V. COLE.

(51 N. H. 287.)

Estoppel — when one is estopped by false representations.

Defendant caused plaintiff's goods to be attached, relying on his representations that they were the property of another. *Held*, that plaintiff was estopped to show that his representations were false, though made without notice of the debt due the attaching creditor and without any intention to deceive him.

ACTION of trover against Cole and Green for feather beds, glassware, crockery, etc. Plaintiff contemplated removing to the west. Charles E. Horn, his son, had gone there before and lived at Jefferson, Ill. Plaintiff packed a box of goods directed to his son at his residence. They were delivered to the railroad agent at East Milan, to be sent as freight. Defendant Cole had a note against Charles E. Horn; brought suit and attached said box at Northumberland, August 29, 1864. The defendant Green was the officer executing the process. September 3, 1864, plaintiff had the goods receipted, and they were forwarded. The suit was settled and plaintiff brings this action for damages for the detention. The plaintiff testified that the goods

belonged to him when shipped. The defendant Cole testified that as plaintiff was passing with the box he said to him: "Are you going to leave us, Horn?" and plaintiff answered "No; but Charles had some things at my house, and I took them and put a few of my things with them into the box and am sending them to Charles." Defendant Cole marked the box for plaintiff, and relying upon this representation as true, procured the attachment of the box as against Charles E. Horn. The plaintiff was not indebted to Cole and there was no evidence to show that he knew that Charles E. Horn was so indebted.

The jury gave defendants a verdict.

Mr. Fletcher, for plaintiff, cited *Andrews v. Lyons*, 11 Allen, 349; *Coggill v. H. & N. H. Railroad*, 3 Gray, 549; *Osgood v. Nichols*, 5 id. 420; *Audenried v. Betteley*, 5 Allen, 384; *Plumer v. Lord*, 9 id. 455; *Langdon v. Doud*, 10 id. 437.

Mr. Ray, for defendants.

PERLEY, C. J. There is no complaint that the rulings and instructions of the court on the trial were erroneous or improper, provided the evidence warranted the jury in returning a verdict for the defendants; and the verdict must stand, if the evidence was competent to prove such representations by the plaintiff as would estop him to set up his title to the goods attached as the property of Charles E. Horn.

The evidence reported in the case was competent to prove that the plaintiff made the representations on the occasion and in the circumstances testified to by Cole; that the plaintiff, though not indebted to Cole, was in debt to others; that Cole, believing the representations to be true, and relying on them as true, caused the goods to be attached as the property of Charles E. Horn; and, also, that the plaintiff made these representations, knowing them to be false, with the intention that all persons who were interested in the subject should take them to be true and act on them as such, and with the intention to mislead and deceive all to whom the representations were communicated, and induce them to act on them as true; that his intention was to deceive his own creditors, and prevent them from taking the goods as his for the debts which he owed to them. These facts must be taken to have been established by the verdict.

But, as there was no evidence that the plaintiff knew Cole had any demand against Charles E. Horn, we cannot infer that the plaintiff had Cole in his mind as an individual whom he meant to deceive by his false representations, or that he had an intent to prevent Cole from taking the goods for a debt which he owed to Cole, as he owed no such debt; and, on the evidence reported, the jury were not at liberty to find that the plaintiff had Cole in his mind as an individual whom he meant to deceive and defraud by inducing him to take the goods for his demand against Charles E. Horn. This raises the point, which the counsel for the plaintiff takes, whether to estop a party from showing that his representations were false, it is necessary that the false representations should have been intended to deceive and defraud the individual party who trusted to them and acted on them, provided there was a general intention to deceive and defraud all persons who were interested in the subject-matter of the false representations.

The ground on which a party is precluded from proving that his representations on which another has acted were false is, that to permit it would be contrary to equity and good conscience. This has been sometimes called an *equitable estoppel*, because the jurisdiction of enforcing this equity belonged originally and peculiarly to courts of equity, and does not appear to have been familiarly exercised at law until within a comparatively recent date; and, so far as relates to suits at law affecting the title to land, I understand that in England and in some of the United States the jurisdiction is still confined to courts of equity. *Storrs v. Barker*, 6 Johns. Ch. 166, 168; *Evans v. Bicknell*, 6 Ves. 174, 178; *Pickard v. Sears*, 6 Ad. & Ellis, 469. The doctrine, however, is a very old head of equity, and is recognized and applied in a great number of the early cases. *Dyer v. Dyer*, 2 Ch. Cas. 108; *Teasdale v. Teasdale*, 13 Vin. 539; *Hobbs v. Norton*, 1 Vern. 136; *Gale v. Lindo*, id. 475; *Hunsden v. Cheyney*, 2 id. 150; *Lamlee v. Hanman*, id. 499; *Raw v. Pote*, id. 239; *Blanchet v. Foster*, 2 Ves. 264; *East Ind. Co. v. Vincent*, 2 Atkins, 83; *Stiles v. Cowper*, 3 id. 693; *Farmer v. Webber*, 13 Vin. Abr. 525; 2 Brown's Parl. Cas. 88; 2 Eq. Cas. Abr. 481; *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Storre v. Barker*, 6 Johns. Ch. 166; *Strong v. Ellsworth*, 26 Vt. 366.

Many of these cases related to underhand agreements in fraud of marriage settlements; but the principle is of general application. 1 Fonblanque's Eq. 167, note x. Relief was given according to

the circumstances of the case, sometimes by enjoining suits at law, in which the legal title was set up, and sometimes by decreeing conveyances and the canceling of deeds and other instruments; but in all these cases relief was given in equity contrary to the strict legal rights of the defendants.

Thus, in the case of an *equitable estoppel*, a party is not allowed to assert his strict legal right, because, in the circumstances of the individual case, it would be contrary to equity and good conscience. Take the present case for an illustration. In trover, following the legal definition of the action, if the plaintiff proves property in himself and a conversion by the defendant, he has maintained his action, and is entitled to a verdict and judgment. It is conceded that the plaintiff owned the goods, and that the defendants converted them. The defense here set up appeals from the strict rule at law to the equitable doctrine that a party shall not be allowed to exercise his legal right of proving the facts, if, on account of his previous declarations or conduct, it would be contrary to equity and good conscience. So in a writ of entry: by the technical rules at law, if the demandant proves seizin in himself and a disseizin by the tenant within the time of limitation, he is entitled to judgment; but if the demandant, having a dormant title to the land demanded, concealed his title and encouraged the tenant to purchase from another, he is not allowed in our practice to set up his legal title, because it would be contrary to equity and good conscience.

It thus appears that what has been called an equitable estoppel, and sometimes with less propriety an *estoppel in pais*, is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights, though now with us, like many other doctrines of equity, habitually administered at law. But formerly the practice was different, and suits at law, the courts being incapable of giving effect to this equity, were often enjoined where the party insisted on his rights at law contrary to the equitable doctrine, as in *Raw v. Pote*, *Stiles v. Cowper*, and *Farmer v. Webber*, *qua supra*.

It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes misled others, if we should confound this doctrine of equity with the *legal estoppel by matter in pais*. The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it

are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy, a record is held to import incontrovertible verity, and for the same reason a party is not permitted to contradict his solemn admission by deed. And the same is equally true of legal estoppels by *matter in pais*. Certain acts done out of court and without deed were, by a technical and unyielding rule of law, upheld on like grounds of public policy, and followed always by certain legal consequences. The legal effect of such acts was not permitted to be controverted by proof.

Thus, if one accepts a lease and enters under it, he is estopped to claim any other estate in the land during the term; he cannot show that he owned the land when the lease was made. Estoppels by *matter in pais* were few in number, and all of this general and well-defined character; and they all enforced some technical rule of the law against the truth, and also against the justice and equity of the individual case. COKE, in his examination of the different kinds of estoppel by *matter in pais*, enumerates the following :

"By livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate." Co. Lit. 352, *a*. In *Lyon v. Reed*, 13 M. & W. 309, PARKE, B., speaking of legal estoppels by *matter in pais*, says: "They are but few, and are pointed out by Lord COKE. Co. Lit. 352, *a*. They are still cases which anciently really were, and in contemplation of law have always continued to be, acts of notoriety no less solemn than the execution of a deed, such as livery, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences follow."

In the authorities which contain the most complete enumeration of the different kinds of legal estoppels and the fullest discussion of the law on the subject, I find no allusion to the equitable estoppel which we are now considering. All legal estoppels, whether by record, by deed, or by *matter in pais*, depended on strict legal rules, and shut out proof of the truth and justice of the individual case. Viner's Abr., Estoppel, *passim*; *Lyon v. Reed*, 13 M. & W. 309; *F-ee-man v. Cooke*, 2 Ex. 658.

For this reason, because legal estoppels, whether by record. deed.

or *matter in pais*, shut out proof of the truth and justice of individual cases, they have been called *odious*, and have been construed with much strictness against parties that set them up. They were formerly required, like other defenses regarded as inequitable, to be pleaded with certainty to a certain intent in every particular. If they were relied on by way of averment and tried by the jury, the jury might find, and according to some authorities were bound by their oath *veritatem dicere* to find, according to the truth of the case regardless of the estoppel. *Trials Per Pais*, 284; Co. Lit. 227, a; Com. Dig., Estoppel (S. 5). The practice is now different, and legal estoppels may be relied on, when given in evidence, without being specially pleaded. Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law, on grounds of public policy.

Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend are usually proved by oral evidence; and the evidence should doubtless be carefully scrutinized, and be full and satisfactory, before it should be admitted to estop the party from showing the truth, especially in cases affecting the title to land. But where the facts are clearly proved, the maxim that estoppels are odious — which was used in reference to legal estoppels, because they shut out the truth and justice of the case — ought not to be applied to these equitable estoppels, as it has sometimes been, inadvertently as I think, from a supposed analogy with the legal estoppel *by matter in pais*, to which they have, in this respect, no resemblance whatever. *Ld. CAMPBELL*, in *Howard v. Hudson*, 2 Ellis & Bl. 10; *Andrews v. Lyons*, 11 Allen, 349, 351. In other cases, where more attention has been paid to the real nature of this equitable doctrine, it has been held that such estoppels are not odious, and to be construed strictly, but are entitled to a fair and liberal application, like other equitable doctrines which are admitted to suppress fraud and promote honesty and fair dealing. *MELLOR* and *COMPTON*, Justices. in *Ashpittel v. Bryan*, 3 Best & Smith, 472; *COWEN, J.*, in *Desell v. Odell*, 3 Hill, 220; *Com. v. Motz*, 10 Barr. 530, 531; *Buckingham v.*

Horn v. Cole.

Hanna, 2 Ohio St. 557; *Van Rensselaer v. Kearney*, 11 How. 326; *Preston v. Mann*, 25 Conn. 118, 128.

In this equitable estoppel, the party is forbidden to set up his legal title because he has so conducted himself that to do it would be contrary to equity and good conscience. As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety; and, unless courts at law are willing to abdicate the duty of administering the equitable doctrine effectually in suppression of fraud and dishonesty, the application of it cannot be confined within the limit of any narrow technical definition, such as will relieve courts from looking, as in other cases depending on fraud and dishonesty, to the circumstances of each individual case. Certain general rules will doubtless apply, as in other cases where relief is sought on such grounds. But I find myself unable to agree with the authorities where the old maxim, that legal estoppels are odious, has been applied to this equitable estoppel, and where attempts have been made to lay down strict definitions, such as would defeat the remedy in a large proportion of the cases that fall within the principle on which the doctrine is founded.

The doctrine having been borrowed from equity, courts at law that have adopted it should obviously look to the practice in equity for their guide in the application of it; and in equity, the doctrine has been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, the doctrine has not in equity been limited to cases where there was an actual intention to deceive. The cases are numerous where the party who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet, if the circumstances were such that he ought to have informed himself, it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. *Hobbs v. Norton*, *Hunsden v. Cheyney*, *Teasdale v. Teasdale, qua supra*; and *Burrowes v. Lock*, 10 Ves. 470. So if the party knew the facts, but mistook the law. *Storrs v. Barker*, 6 Johns. Ch. 166. Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals. If the representations are

such, and made in such circumstances, that all persons interested in the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to them and acted on them. *Gale v. Lindo, Farmer v. Webber, qua supra.*

In the much and well-considered case of *Preston v. Mann*, 25 Conn. 118, 128, STORRS, J., in delivering the opinion of the court, says: "The doctrine of estoppel *in pais*, notwithstanding the great number of cases which have turned upon it and are reported in the books, cannot be said even yet to rest upon any determinate legal test which will reconcile the decisions, or will embrace all transactions to which the general principles of equitable necessity wherein it originated demand that it should be applied. In fact, it is because it is so peculiarly a doctrine of practical equity, that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished." This was said in 1856, and little has since been done toward extricating the doctrine from the confusion and conflict of authority with which it was then embarrassed. This, as I think, has been caused by the fact that courts have continued to exercise their ingenuity in the vain attempt to compress a broad doctrine of equity within the narrow limits of a technical definition.

The case of *Pickard v. Sears*, 6 Ad. & Ellis, 469, decided as late as 1837, appears to have been regarded, both in England and in this country, as the leading case at law on this subject. It was trover by the mortgagee of personal goods against the defendants, who were purchasers at a sheriff's sale on execution against the mortgagor. The facts set up in defense were, that the plaintiff was present at the sale, did not disclose his title as mortgagee, and encouraged the defendants to purchase. The question on trial was as to the property of the plaintiff in the goods, and Lord DENMAN directed a verdict for the plaintiff. A rule to show cause why the verdict should not be set aside was made absolute.

In delivering the judgment of the court, Lord DENMAN said: "His (the plaintiff's) title having been established, the property could only be divested by gift or sale, of which no specific act was even surmised. But the rule of law is clear, that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from

Horn v. Cole.

averring a different state of things as existing at the same time ; and the plaintiff might have parted with his interest in the property by a verbal gift or sale, without any other formalities that threw technical difficulties in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution was a fact of such a nature that the opinion of the jury ought to have been taken whether he had not, in point of fact, ceased to be the owner."

It is worthy of note, that in this suit at law the court, so late as 1837, after stating the general equitable doctrine, did not venture to put the defense directly on the ground that the plaintiff was estopped by his conduct to prove the truth of the case, but allowed the facts to go to the jury as evidence that the plaintiff, in some undefined and mysterious way, had parted with his property in the goods: so late and so reluctant were the courts to admit in suits at law this defense, which depended on fraud and dishonesty, and which belonged, originally and appropriately, to the jurisdiction in equity.

It can hardly be supposed that Lord DENMAN, in the statement which he made of this equitable doctrine in reference to the facts of that case, understood that he was laying down a technical definition fixing the limits of the doctrine, and excluding all cases that did not come clearly within the terms which he used on that occasion. Nevertheless, these remarks of Lord DENMAN have often been treated as a sort of authoritative text, covering the whole ground, which it was the business of courts in later cases to expound and explain. And it is curious to observe what different and contradictory interpretations have been put on his statement of the equitable doctrine. It has been cited in Massachusetts as authority for decisions, in which it has been held that the representations, to estop the party from showing they were not true, must have been made with the intent to deceive, and the intent to deceive the party who sets up the defense. *Plumer v. Lord*, 9 Allen, 455; *Andrews v. Lyons*, 11 id. 349. And in California the same case has been relied on for the rule that where a representation comes in any way to the ears of a party, who acts on it, the party making the representation is estopped to deny its truth unless it had the character of a confidential communication. *Mitchell v. Reed*, 9 Cal. 204. In England it has been treated as a statement of the equitable doctrine made in reference to the circumstances of that case, and not intended as a formal and complete definition. *Freeman v. Cooke*, 2 Ex. 654;

Gregg v. Wells, 10 A. & E. 90; *Jorden v. Money*, 5 House of Lords Cas. 212.

It would be a laborious and not a profitable task to attempt an analysis of all the recent decisions on this subject. I will briefly advert to some of those which appear to be the most important.

In *Plumer v. Lord*, 9 Allen, 455, it was held that to create an estoppel *in pais*, the declarations or acts must have been accompanied with a design to mislead; and *Langdon v. Doud*, 10 Allen, 433, is to the same point. In *Andrews v. Lyons*, 11 id. 349, the court went one step further, and decided that the declarations or acts must have been accompanied with a design to deceive the party who sets up the estoppel, and induce him to act on them; and in this last case it is said that such an estoppel shuts out the truth, and is odious, and must be strictly proved. In *Hawes v. Marchant*, 1 Curtis' C. C. 144, the rule is laid down that to be estopped the party must have designedly made admissions inconsistent with the defense or claim which he proposes to set up, and another, with his knowledge and consent, so acted on this admission that he will be injured by allowing the admission to be disputed; and this rule is cited and apparently approved in *Audenreid v. Betteley*, 5 Allen, 382.

In these cases, it is to be observed, the court have not been content with saying, in reference to the facts before them, that if certain things concurred in the case it would fall within the equitable doctrine and the party would be estopped, but they have undertaken to lay down a strict legal definition of general application, excluding from the operation of the doctrine all cases that do not fall within the terms of the definition. Applying the rule, as laid down in *Hawes v. Marchant*, to the present case; if Horn had known that Cole had a demand against Charles E. Horn, had falsely represented to Cole that the goods belonged to Charles with the design to deceive him and induce him to attach the goods as the property of Charles, and Cole, relying on the representation, had taken the goods as the property of Charles and as Horn intended, yet, if after he had made the false representation he did not know that the goods were taken as the property of Charles, and assent that they should be so taken, he would not be estopped to set up his own title in the goods. The statement that another party must have acted on the false statement with his *knowledge and assent* must mean this, or it can mean

nothing; for he could not know that he had acted on it at all until the act was done and accomplished.

The remark of Lord CAMPBELL in *Howard v. Hudson*, *qua supra*, though not called for by the case, is to the effect that the representation must have been intended to deceive.

These authorities would seem to sustain the plaintiff's counsel fully in his position that the false representation must not only be intended to deceive, but also to deceive the identical party that acted on them.

There are, however, authorities of equal respectability, and in greater numbers, which maintain a different doctrine.

In England, the case of *Pickard v. Sears* does not appear to have been understood as intended to lay down a complete definition of the equitable doctrine excluding all cases that could not be brought within the terms of the remarks made by Lord DENMAN. In *Freeman v. Cooke*, 2 Ex. 654, it was held that the term *willfully*, used in *Pickard v. Sears*, was not to be understood in the sense of *maliciously*; and that whatever a man's real meaning may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it, and he did act on it as true, the party making the representation would be equally precluded from contesting its truth. This is wholly inconsistent with the notion that an intention to deceive is an essential ingredient of the representation, which precludes the party making it from showing that it was false. So in *Jorden v. Money*, 5 House of Lords Cas. 212, it was held not to be necessary that the party making the representations should know that they were false; that no fraud need have been intended at the time; but if the party *unwittingly* mislead another, you must add that he has misled him under such circumstances that he had reasonable ground for supposing that the person whom he was misleading would act upon what he was saying.

In *Gregg v. Wells*, 10 A. & E. 90, Lord DENMAN says, "*Pickard v. Sears* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who *negligently* or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterward dispute that fact in the action against the person whom he has himself assisted in deceiving." This shows that Lord DENMAN did not himself understand that his

remarks in *Pickard v. Sears* were to be taken as a definition and limitation of the equitable doctrine, for he says the principle of the case might be stated more broadly than it is laid down there, and may include the case of culpable negligence. So *Hobbs v. Norton*, 1 Vern. 136; *Hunsden v. Cheyney*, 2 id. 150; *Teasdale v. Teasdale*, 13 Viner, 539; *Burrowes v. Lock*, 10 Ves. 475, before cited, show that the practice in equity does not require that there should in all cases be an intention to deceive, or even a knowledge that the representation was false.

We come now to the decisions in this country, which give a broader application to this doctrine than those before cited.

In *Dezell v. Odell*, 3 Hill, 221, the general doctrine is said to be that when a party, either by his declarations or his conduct, has influenced a third person to act in a particular manner, he will not be afterward permitted to deny the truth of the admission if the consequence would be to work an injury to such third person, and that in such case it must appear, first, that he made an admission which is clearly inconsistent with the evidence he proposes to give, or the claim which he proposes to set up; second, that the party has acted on the admission; third, that he will be injured by allowing the truth of the admission to be disputed. According to this interpretation of the equitable doctrine, it would seem not to be necessary that the representation should be intended to deceive or that the party making it should know it to be false, or that it should be intended the party should act on it, who does so in fact, and is deceived by it. The rule of this case has been adopted and followed in *Newman v. Hook*, 37 Miss. 207; *Carpenter v. Stilwell*, 12 Barb. 135, and *Eldred v. Hazlett*, 33 Penn. St. 316.

In *Roe v. Jerome*, 18 Conn. 138, the general doctrine is stated to be, that where one person by his words or conduct causes another to believe in a certain state of things, and thus induces him to act on that belief so as injuriously to affect his previous position, he is concluded from averring a different state of things as existing at the time; and this rule was followed in the later cases of *Cowles v. Bacon*, 21 Conn. 451, and *Dyer v. Cady*, 20 Conn. 563; and in *Preston v. Mann*, 25 Conn. 118, before cited, it is said that the doctrine did not then rest on any determinate legal test which will embrace all transactions to which the general principles of equity, in which it originated, demand that it should be applied.

Buchanan v. Moore, 13 S. & R. 304, 306, is to the point that

Horn v. Cole.

though the party believed his representation to be true, and made it under a mistake, he is estopped to show that he made the representation innocently believing it to be true, provided the other party acted on it, and had reason to act on it, as true. So in *Strong v. Ellsworth*, 26 Vt. 366, it is said by REDFIELD, C. J., that he who by his words or actions, or his silence even, intentionally or *carelessly* induces another to do an act which he would not otherwise have done, and which will prove injurious to him if he is not allowed to insist on the fulfillment, may insist on such fulfillment, and that the doctrine of equitable estoppels lies at the foundation of morals. In *Mitchell v. Reed*, 9 Cal. 204, it was held that where a statement made to a third person is not confidential, but general, and is acted on by others, the party making the declaration is estopped to deny its truth; that the intention with which the declaration is made is not material, except, perhaps, where it is confidential. This case, and *Quirk v. Thomas*, 6 Mich. 76, are authorities that to work the estoppel it is not necessary the declaration should be made to the party who acts on it, nor in his presence, nor that the declaration should be intended to come to the knowledge of any particular person.

In a suit at law to recover damages for a false affirmation that the signer of a note was of age, it was decided, in *Lobdell v. Baker*, 1 Metc. 193, that it was not necessary to allege or prove that the defendant knew the signer was an infant. WILDE, J., in delivering the opinion of the court, said: "A party may render himself liable in an action for damages to a party prejudiced by a false affirmation, though not made with any fraudulent intention." This, it may be said, is not directly in point, but the only difference is in the form of the remedy. The principle involved is the same, whether the question is raised in a suit to recover damages for the false representation, or redress is sought by estopping the party to prove the falsehood of the representation. Both cases go on the same general ground, that the party is responsible for the consequences of his false representation.

There are numerous authorities that it is not necessary to the estoppel that the declarations or conduct should be intended to deceive any particular person or persons; that if they were intended to deceive generally, or were of such a character and made in such circumstances that it must have been understood they were likely to deceive, and any person using due diligence was in fact deceived

by them, it is enough. *Gregg v. Wells*, 10 A. & E. 90; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 353; *Adams County v. Brown*, 16 Ohio St. 78; *Dezell v. Odell*, 3 Hill, 221; *Quirk v. Thomas*, 6 Mich. 76; *Mitchell v. Reed*, 9 Cal. 204.

It has been declared in many cases that this equitable estoppel involves a question of legal ethics, and applies wherever a party has made a representation, by words or conduct, which he cannot in equity and good conscience prove to be false; and that this kind of estoppel, being a broad doctrine of equity, cannot be limited in application by the terms of any narrow legal definition. In the *Canal Co. v. Hathaway*, 8 Wend. 483, it is said by SUTHERLAND, J., that the party is estopped when in good conscience and equity he ought not to be permitted to gainsay his admission; and in the same case, by NELSON, J., "from the means in which the party must avail himself of these estoppels, it is obvious that there can be no fixed and settled rules of universal application." And in *Dezell v. Odell*, 3 Hill, 225, BRONSON, J., adopting the language of NELSON, J., in the *Canal Co. v. Hathaway*, adds, "It is a question of ethics." In *Strong v. Ellsworth*, 26 Vt., REDFIELD, J., says the doctrine lies at the foundation of morals. In *Lucas v. Hart*, 5 Iowa, 415, the court hold that "in these estoppels there can be no fixed and settled rules of convenient application to regulate them as in technical legal estoppels; that in many, and probably in most instances, whether the act or admission shall operate as an estoppel or not must depend on the circumstances of the case, though there are some general rules which may materially assist in the examination of such cases." In the application of these general rules to that case, the court decided that the acts and admissions of the respondent estopped him from asserting his title to the property in question; that to permit him to do it would be "unconscionable, and contrary to that fairness and honest dealing which courts of equity seek ever to promote and encourage."

In *Frost v. The Saratoga Co.*, 5 Denio, 154, it is said by BEARDSLEY, C. J., that such an estoppel is a question of ethics, and is allowed to prevent fraud and injustice, and exists wherever a party cannot in good conscience gainsay his own acts or assertions. The case of *Preston v. Mann*, 25 Conn. 118, is strong to the point that this estoppel, depending on a broad doctrine of equity, cannot be governed in application by narrow and strict rules of construction, such as have prevailed in legal estoppels.

Horn v. Cole.

In some if not most of the cases, in which it is said that if a party makes representations intending to deceive the party that acts on them, the equitable estoppel applies, it was not intended, as I think, to lay down a rule excluding all cases that did not fall within the statement made in reference to the facts of the case then under consideration; that what is said is not to be taken as a rule to limit and define the doctrine and exclude all other cases. They say, if such and such things concur, *this case* will fall within the doctrine; but they do not intend to say no other cases are within it. For example, in *Kinney v. Farnsworth*, 17 Conn. 361, STORRS, J., says that "admissions which have been the means, *designedly*, of leading others to a particular course of conduct, cannot afterward be conscientiously retracted by one who has made them." He could not have intended to lay down the rule that one would in no case be estopped by a representation not *designed* to deceive, because the same judge, in *Preston v. Mann*, says, "The doctrine is not reduced to the limits of any formula," and "whatever the *motive* may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his condition, he is legally charged with the intent to induce the other to believe and to act on that belief, if such proves to be the result." So Lord DENMAN, speaking, in *Gregg v. Wells*, 10 A. & E. 90, of his judgment in *Pickard v. Sears*, says, "The principle of that case may be stated even more broadly than it is there laid down."

In this State we have several cases where the general question has been more or less considered. In *Wells v. Pierce*, 27 N. H. 503, the doctrine of equitable estoppel was traced to its origin in equity, and it was held that if the owner actively encourages the purchase of his property from another, he will be precluded from claiming it, though he was not aware of his interest at the time; which is clearly in conflict with the notion that the representation must be accompanied with an intention to deceive. In *Davis v. Handy*, 37 N. H. 65, the doctrine of *Wells v. Pierce* was approved and applied. In the recent case of *Drew v. Kimball*, 43 N. H. 285, one point directly involved was, whether it was necessary that the party to be estopped should intend to deceive and defraud the individual to whom the representation was made, and who set up the defense; and it was held that it was not necessary. Indeed, it seems to me that it would be trifling with a doctrine depending on equity and good conscience to hold otherwise. So, if a representation was intended to deceive one man,

and it in fact deceived and defrauded another. Then again, if the representation were intended to have one operation, and, as it turned out, deceived and defrauded by another method not contemplated by the party at the time, but still the natural consequence of the representation, it would be quibbling with a doctrine depending for its application on the morality of the act to hold that the party would not be answerable for the consequences of his false and fraudulent representation as much as if it had taken effect on the party and in the manner intended. In a case depending on a question of "legal ethics," it would bring down the morality of the law to a very low standard to hold that a party was not liable for the wrong caused by his fraud to one man, because the fraud was contrived against another man.

In *Drew v. Kimball* the case did not raise the precise point taken in this case. But, on a full discussion of the general doctrine and a review of the authorities, the court, adopting the hypothetical case put by PARKE, B., in *Freeman v. Cooke*, say: "If, whatever a man's intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth. In short, the representations are to be regarded as *wilful*: when the person making them means them to be acted on, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it."

There have been several other cases in this State where this equitable doctrine has been considered and applied. *Thompson v. Sanborn*, 11 N. H. 201; *Simons v. Steele*, 36 id. 73; *McMahon v. Portsmouth Ins. Co.*, 22 id. 15; *Odlin v. Gove*, 41 id. 473; *Corbett v. Norcross*, 35 id. 99, 115; *Richardson v. Chickering*, 41 id. 380, 385. Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this State to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition. We are content to follow where the spirit and general tone of these decisions lead; and they

State v. Rand

lead plainly to the conclusion, that, where a man makes a statement disclaiming his title to property, in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and, if they had an interest in the subject, would act on as true, and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false to the injury of the party who believed it to be true and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant to deceive, or, that his fraud did not take effect in the manner he intended.

Our conclusion is, that, on the facts which the verdict has established, the plaintiff was estopped to show his representation that the goods belonged to Charles E. Horn to be false, though he did not know that the defendant Cole had any demand against Charles E. Horn, and though he had not Cole in his mind as the party whom he meant to deceive.

Judgment on the verdict.

STATE V. RAND.

(51 N. H. 361.)

Witness — privilege

Where the sale of liquor is made a criminal offense by the statute, the purchaser of the same is not guilty of a criminal act, and hence is not excused from testifying as to the purchase on the ground that it would tend to criminate him.

INDICTMENT against Hamilton L. Rand for the unlawful sale of spirituous liquors. The charge in the indictment was that the prisoner on July 1, 1871, at Concord, not being a town agent and authorized thereto, sold a glass of spirituous liquor to one Charles E. Savory.

The State called said Savory as a witness, and asked him the following question: "Have you purchased any spirituous liquor of

the defendant within a year past? Savory answered as follows: "I decline to answer, because it would criminate myself. If I induced him to sell me liquor would I not be a participator in that act?"

The court found as follows: Defendant was not a town agent; the witness knew it; witness requested defendant to sell him a glass of spirituous liquor; defendant complied, and would not have made the sale without the request; both witness and defendant knew the sale would be and was a criminal offense. The court reserved the question whether on the foregoing facts the witness should be compelled to testify.

L. W. Clark, Attorney-General, for the State.

A. & F. A. Fowler and Minot, Tappan & Mugridge, for the witness.

SMITH, J. The question presented is whether the purchase constituted a crime. If it did the purchaser cannot be compelled to testify. Constitution of N. H., Bill of Rights, article 15.

"If any person shall sell * * * spirituous liquor * * * he shall be fined * * *," etc. Gen. Stats., ch. 99, § 13. It is argued that the purchaser aids in or procures the sale, and thus makes himself criminally liable under sec. 1 of ch. 266, Gen. Stats., which provides that "if any person shall aid in, counsel, hire, or procure the commission of any offense, or shall be accessory thereto before or after the fact, he shall be punished in the same manner as the principal offender, and may be tried and convicted thereof either before or after the conviction of the principal." Probably the chief purpose of the original enactment of this statute in 1842 (Rev. Stats., ch. 221, § 1) was to remedy the defects in the common law relative to the trial of accessories, to which public attention had been directed by the trial of Knapp, for the murder of Joseph White, at Salem, Massachusetts, in 1830. See 1 Bishop's Crim. Law (3d ed.), § 614. So far as the statute declares aiders and procurers criminals, it is, in the main, only a reenactment of the common law. An enactment "in its nature declaratory of the common law" "will be construed, as far as may be, according to the common law." "A statute, general in its terms, is always to be taken as subject to such exceptions as the common law requires." 1

Bishop's *Crim. Law* (3d ed.), §§ 191, 192. It could not have been the intention to repeal by this statute the established rules of interpreting and construing penal statutes. If, prior to the enactment of the statute relative to accessories, a particular phraseology in statutes of special description was construed as exempting a certain class of persons from criminal liability as aiders or procurers, that rule of construction still remains in full force. Upon the creation by statute of a new offense, the intention of the legislature to exempt procurers from the statute penalties need not be manifested by an express provision to that effect. It may be inferred from the phraseology of the statute, construed according to established rules of interpretation, and considered in connection with the general scope and purpose of the statute. Neither the sale nor the purchase of liquor is a crime at common law. In legal contemplation, the sale "is an offense because the statute declares it to be so, and for that reason alone. It is an offense, therefore, which has precisely the proportions that statute gives to it, and it can have no other or greater." Have the legislature, in the statute prohibiting the sale of liquor, manifested their intention that purchasers should not be subject to the operation of the general rules of law relative to aiders and accessories?

The statute itself, "by the distinction it makes," in the section imposing the penalty, has marked the seller as the only criminal. "Every sale implies a purchaser; there must be a purchaser as well as a seller; and this must have been known and understood by the legislature." Yet the penalties for selling are all imposed upon one of the parties, the seller. In most offenses, the coöperation of two persons, occupying different and, in one sense, antagonistic relations, is not requisite to the commission of the crime. The criminality of an assault, for instance, does not depend on the mental concurrence or physical co-operation of the assailant and the assailed. In such cases it cannot be contended that the omission to insert in each penal statute the general rules of law relative to accomplices and accessories, evinces the legislative intention to except such persons from criminal liability. But the case at bar is different. Here is an offense, created by statute, which cannot be committed except by the physical co-operation and mental concurrence of two persons who occupy different, not to say antagonistic relations, and act from widely different motives. There may be very slight foundation, in abstract reason, for making any discrimination as to the relative

guilt of these parties; but it is matter of common knowledge, that the public at large do make a marked distinction between them, believing the purchaser by far less culpable than the seller, and frequently regarding the former as the victim of the latter. Under such circumstances, does not the imposition of the penalty upon that one of the two indispensable parties to the commission of the offense, who is, in popular estimation, much the more culpable, imply an intention to allow the other party to go unpunished? '*Expressio unius est exclusio alterius.*'"

This construction is strengthened by considering the probable purposes of the legislature in enacting the prohibitory liquor law. Conceding that one object was the protection of the community at large, it is still undeniable that another and a prominent object was the protection of the buyer, or, rather, the class of persons likely to become buyers. The law was designed to protect men against themselves; to relieve the weak by removing temptation.

The rules of statute interpretation, enunciated prior to the enactment of the prohibitory liquor law, and still recognized as sound, justify the court in giving weight to the above considerations. In cases of *mala prohibita*, the fact that the penalty is in terms imposed upon only one of two parties whose concurrence is requisite to the commission of the offense, and that the statute was made for the protection of the other party, who is generally regarded as the less culpable of the two, has repeatedly been considered good ground for giving the statute a construction exempting the party not named from criminal liability. See *Browning v. Morris*, Cowp. 790; *Williams v. Hedley*, 8 East, 378; *Tracy v. Talmage*, 14 N. Y. 162, pp. 181-186; *Curtis v. Leavitt*, 15 id. 9, pp. 285-289; *Sackett's Harbor Bank v. Codd*, 18 id. 240; *Buffalo City Bank v. Codd*, 25 id. 163; RICHARDSON, C. J., in *Roby v. West*, 4 N. H. 285, pp. 288, 289; PERLEY, C. J., in *Prescott v. Norris*, 32 id. 101, p. 105; *White v. Franklin Bank*, 22 Pick. 181; SARGENT, J., in *Butler v. Northumberland*, 50 N. H. 33, pp. 38, 39.

If any doubt still remains as to the meaning of section 13, chapter 99, we think that doubt can be removed by examining other portions of the chapter.

Section 25 of chapter 99 imposes a fine of from one to ten dollars, or imprisonment not over thirty days, as a penalty for drunkenness in certain places or under certain circumstances. The drunker ones thus punished might, of course, result from the use of liquors

imported by, or given to, the consumer; but it is not unlikely to be the result of the use of liquor sold to the drinker in violation of law; and the 26th section of chapter 99 (as well as the 9th section of the original prohibitory law, P. L., 1855, chapter 1658) clearly indicates that the legislature contemplated the possibility, or, rather, the probability, of such a state of facts. If, then, the purchaser is liable under section 13, he may, in some instances, be subjected to a double punishment. Such a result is not beyond the power of the legislature, but it is not to be easily presumed that they intended to accomplish it. It has been forcibly observed, that "it seems hardly consistent with the obvious general purport of the law, which in terms is leveled almost exclusively against the seller, to say that the legislature intended to punish the unfortunate buyer with the same severity as the seller, and, in addition, to pursue him with a further penalty for consequences which would never have befallen him but for the prohibited act of the principal offender." On the contrary, the contingency that the purchaser may be punished under section 25 increases the probability that the legislature intended that he should be exempted from the penalties of section 13; tending to show that the omission in section 13 to impose the penalty upon the purchaser as well as the seller was intentional.

Section 26 of chapter 99 provides that if the person arrested for drunkenness shall, before conviction, "disclose of whom and where he obtained the liquor producing such drunkenness, file his complaint on oath against the person furnishing the same, and testify fully on his trial in relation thereto, he shall be discharged." The original prohibitory law (P. L., 1855, ch. 1658, § 9), of which chap. 99, Gen. Stats., is a substantial reenactment, clearly shows from what the witness is to be "discharged." The language there used is: "The said magistrate or court shall thereupon discontinue the said prosecution for drunkenness, and the person so arrested shall be discharged, and shall not be liable to be prosecuted again for the same offense, and the county shall pay the costs of the said prosecution."

If the purchaser is liable to the penalties imposed upon the seller, the provisions of section 26 are somewhat extraordinary. In that view, section 26 is an offer to a criminal to relieve him from the consequences of one offense if he will confess himself guilty of another offense. The penalty from which he is thus allowed to relieve himself may be as light as a fine of one dollar. The penalty to

which he makes himself liable by his confession cannot be less than \$50. If the drunkard is imprisoned under section 25, the longest term is thirty days. But, if he is liable for aiding the seller to commit a second offense, he may be punished by imprisonment for ninety days, as well as by a fine of \$100. "There is a strong intrinsic improbability that any such legislation should have been designed, and such a construction of the statute can be adopted only when it is found that it is reasonably capable of no other."

If the legislature did not intend that the buyer should be exempted from all penalties imposed upon the seller, it is hardly conceivable that they would have offered him such an inadequate motive for testifying to the fact of purchase. They would undoubtedly have added to section 26 a proviso exempting the witness from prosecution "for any offense so disclosed by him." Such a proviso is inserted in the twentieth section of the same chapter, relative to the compulsory testimony of clerks, servants or agents.

It is true that, in the latter section, the insertion of such a proviso may have been a constitutional necessity; but that section shows that the legislature understood themselves to have the power of giving such indemnity, and it is very clear that, if the construction now contended for by the witness is correct, such an indemnity is absolutely essential to make section 26 effect the purpose for which it was obviously intended, viz., the procurement of testimony against sellers.

In the case at bar, the court at the trial term have found, as matter of fact, that the witness requested the defendant to sell the liquor; that the sale was made in consequence of the request; and the witness, by his request and the usual promise of payment understood and implied therefrom, induced and procured the defendant to make the sale. If it were material to the decision of the question raised, we should be inclined to remand the case to the trial term for a further and fuller finding of facts. Upon such further finding it might, perhaps, appear that the defendant had, prior to the sale to the witness, held himself out as engaged in the business of liquor-selling; that it was in consequence of this holding out that the witness was induced to make the request; and that the defendant's standing offer to sell was the immediate cause of purchase — the purchaser's so-called "request" being in effect nothing more than an acceptance of the defendant's standing offer. But it is not material to inquire more fully into the facts of this

State v. Rand.

particular case. In at least nineteen-twentieths of the illegal sales of liquor, one of the proximate causes of the purchaser's request to buy is his knowledge, derived from the seller's words or acts, of the seller's willingness to sell.

The legislature, fully aware of this state of things, have seen fit to pass a general law applicable to all cases alike, leaving, as we think, no opportunity for the courts to establish exceptions grounded on the special circumstances of particular cases. As we view that law, the purchaser is not liable by reason of his participation in the sale, no matter whether he is more or less responsible for inducing the sale.

Very few direct authorities have been cited by counsel. *Doran's case*, 2 Parsons' Select Cases (Penn.), 467, referred to by the counsel for the witness, is not in point. The Pennsylvania statute of February 17, 1762, made it a crime for any person "to buy, sell, or expose to sale" tickets in lotteries. In 1846 the question was raised, whether the purchaser could be compelled to testify against the seller. The court held that that part of the statute of 1762, which makes it an offense to buy a lottery ticket, was still in force, and, of course, excused the purchaser from testifying. In *State v. Bonner*, 2 Head (Tenn.), 135, the remarks of McKINNEY, J., which are accurately quoted in the note to 1 Bishop on Crim. Law (3d ed.), 605, directly sustain the refusal of the witness. The Tennessee statute prohibited the sale of liquor by slaves; and the case decides that a white man who purchases from a slave commits a criminal offense. *Com. v. Willard*, 22 Pick. 476, decides that a witness is not excused from testifying to a purchase of liquor from an unlicensed vendor. We are not prepared to adopt the view there advanced, that one who approximates so nearly to the direct act, as a purchaser does, is not liable as an aider or accessory, because of the comparatively insignificant character of the main offense.

There are, however, other reasons assigned by SHAW, C. J., not dissimilar to some grounds taken in this opinion. In *Com. v. Downing*, 4 Gray, 29, the court, without any statement of reasons, recognized the decision in *Com. v. Willard*, as applicable in prosecutions under the more stringent prohibitory law; and this decision has been followed in later cases. See *Cobb v. Farr*, 16 Gray, 597, 598; *Walan v. Kerby*, 99 Mass. 1, 2, 3; *Adams v. Goodnow*, 101 id. 81, 82.

In this State, statutes have been in force "almost from the foun-

Adams v. Adams.

dition of the government," inflicting penalties under certain circumstances upon sellers of liquor. Hundreds of prosecutions and convictions of sellers have been had under these statutes, "most of which have been sustained by the testimony of buyers." The sellers have often been highly indignant with the buyers for testifying truly, and have sometimes resorted to personal violence to gratify their revenge. Yet no prosecution against the buyer for aiding or abetting the sale has ever been attempted, within the knowledge of the court. Nor have counsel cited any instance of such a prosecution under similar statutes in other jurisdictions, unless it be the Tennessee case. That such a prosecution is unprecedented in this State "shows very strongly what has been understood to be the law upon the subject." See SHAW, C. J., in *Com. v. Willard*, 22 Pick. 476, 478.

The witness should be directed to answer, and, if he refuses, should be punished for contempt.

Case discharged.

ADAMS v. ADAMS.

(51 N. H. 388.)

Divorce — setting aside decree — power of court.

Courts have the same power over judgments in divorce suits as in other cases, and will vacate and set aside a decree that has been obtained by fraud or imposition.*

MOTION by Melinda Adams to set aside a decree of divorce granted in Hillsborough county, December term, 1864.

The moving party offered to show that the decree had been obtained by fraud and perjury; that the libellant knew her residence at the time, and caused publication to be made of the notice in a paper that he had every reason to believe would not be seen by the libellee or any of her friends, and for the purpose of concealing the proceedings; that this motion was made at the first term after information was received that the divorce had been granted, and finally that the

* See to same effect *Edson v. Edson*, 11 Am. R. 393.

Adams v. Adams.

libellant had not married again. The court decided that the offered proof was incompetent, and the libellee excepted.

Geo. Y. Sawyer & Sawyer, Jr., and Isaac W. Smith, for libellant.

Larl & Sulloway, Morrison & Stanley and P. B. Cilley, for libellee.

BELLOWS, C. J. As a general proposition, courts have power to set aside, vacate, modify, or amend their judgments for good cause shown. *Judge of Probate v. Webster*, 46 N. H. 518; *Bellows v. Stone*, 14 id. 203; *Frink v. Frink*, 43 id. 508; *Wiggin v. Veasey*, id. 513, and cases cited; and *Chamberlain v. Crane*, 4 id. 115.

In this respect decrees in divorce suits stand upon the same footing as other judgments, both upon principle and authority. Bishop, in his work on Marriage and Divorce, 1st ed., § 697, lays it down as a general proposition, that the American tribunals, when unincumbered by specific statutory directions, have been governed by substantially the same principles in divorce causes as in others, in respect to opening decrees, or granting rehearings, writs of error, or *certiorari*, or otherwise, according to the practice of the court, re-examining the question, except that there has always been a manifest reluctance to disturb a final judgment of divorce, especially after a second marriage involving the interests of third persons; for which he cites authorities from Ohio, New York, Kentucky, and Delaware. So is 1 Phillipps' Ev. 341. The same doctrine is laid down in a later edition by the same author. 2 Bishop on Mar. and Div., § 751.

It is equally well settled that judgments may be set aside or vacated when procured by fraud, but not on the application of a person who is himself a party to the fraud, nor will the judgment be avoided for fraud when the same question of fraud was tried in the original action. This doctrine is fully sustained by the case of *Tebbetts v. Tilton*, 31 N. H. 287, and cases cited; and in that case the subject was carefully considered.

So it is well settled that a judgment may be vacated, or the record of it amended, on the ground that it was entered up by mistake. *Bellows v. Stone*, 14 N. H. 203; and in this case the application to set it aside was made more than eleven years after the judgment was rendered. This was a bill in equity; and although it was held that courts of equity will set aside judgments at law when obtained by fraud, it would not do so for any error in the proceedings, but

leave the party to his petition in the court of law. *Chamberlain v. Crane*, 4 N. H. 115, *Wiggin v. Veasey*, 43 id. 313, and *Frink v. Frink*, id. 508, are cases where mistakes in entering up judgments were corrected many years after the judgments were rendered.

Much more should judgments be corrected or vacated when they have been obtained by the fraud of one party, and the other is in no way implicated in it. The authorities indeed to this point are numerous and quite satisfactory in other jurisdictions. Among them are *Fermor's case*, 3 Co. 77, 78, a; Story on Con. of Laws, § 597; Starkie's Ev., pt. 2, §§ 77 and 83; *Duchess of Kingston's case*, 11 State Trials, 261; 1 Phillipps' Ev. 341; 2 Kent's Com. 655. In *Fermor's case* it is laid down that the law so abhors fraud and covin that all acts, as well judicial as others, and which of themselves are just and lawful, yet, being mixed with fraud and deceit, are in judgment of law wrongful and unlawful.

In *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600, STORY, J., p. 604, says: "I know of no case where fraud, if established by competent proofs, is not sufficient to overthrow any judgment or decree, however solemn may be its form and promulgation." The case there was a decree of a foreign court *in rem*, which in general was held to be conclusive. So in *Harding & Wife v. Alden*, 9 Greenl. 151, the general doctrine is recognized that "fraud and collusion, when pleaded and verified, vacate all judgments and decrees." So is Broom's Legal Maxims, *254, and cases cited.

As to the mode of avoiding a judgment or decree obtained by fraud, there is some diversity in the decisions, although it is generally held that such judgment or decree cannot be collaterally attacked by either party to it, but can be avoided only by proceedings instituted directly for that purpose. In some cases, however, a bill in equity to restrain the enforcement of such judgment or decree has been sustained, as in *Huggins v. King*, 3 Barb. S. C. 616, where a party had a good defense to a suit at law, but was prevented setting it up by the gross fraud of the plaintiff and others.

A similar doctrine was held in this State, in *Hibbard v. Eastman*, 47 N. H. 507, and cases cited; so is 2 Kent's Com. 655, and so is *Vanmeter v. Jones*, 2 Green N. J. Ch. 520. These cases clearly recognize the doctrine that the party, injured by a judgment obtained by fraud, may in some form avoid the effect of it. The general doctrine is also recognized in *Great Falls Manf'g Co. v. Worster*, 45 N. H. 110.

It has been said that neither a party to a judgment nor a privy can impeach it for fraud — 3 Cow. & Hill's *Phillipps' Ev.*, note 610; but this doctrine was considered in *Tebbetts v. Tilton*, 31 N. H. 287, and repudiated, and for reasons that are entirely satisfactory to us. If the position had been taken that such judgment could not be collaterally impeached by a party or privy, it would be supported by the authorities; and from the reference in the note to *Davy v. Had-don*, 3 Doug. 310, and the notes to that case which hold that a party must apply to the tribunal which rendered the judgment to vacate it, it is not certain that any thing more was meant by the learned editors.

This doctrine, in regard to impeaching judgments and decrees for fraud, has been applied in numerous cases to decrees in divorce suits and suits for nullity of marriage, and the weight of authority is greatly in favor of such application. Upon principle, there is no solid ground for any distinction between decrees in divorce suits and other judgments; or if there be any, it is to be found in the much greater danger of fraud and imposition in divorce cases, as compared with others; thus adding largely to the necessity and importance of preserving the power to correct or vacate decrees that have been obtained by fraud and imposition. Accordingly it is laid down in Bishop on Mar. and Div., § 699, that if a tribunal has been imposed upon, and in consequence of the fraud a judgment of divorce has been wrongfully rendered, it may vacate this judgment, when, upon a summary proceeding, it is made cognizant of the fraud; and see *id.*, § 706, note 4, and cases cited, and also *id.* 697. This is the doctrine of *Allen v. Maclellan*, 12 Penn. St. 328 (2 Jones), and of *Dunn v. Dunn*, 4 Paige's Ch. 425.

In Story on Conflict of Laws, § 597, it is said, speaking of foreign sentences of divorce, that "fraud in this, as in other cases, will vitiate any judgment, however well founded in point of jurisdiction." So is 2 Kent's Com. *109. So in *Roach v. Garvan*, 1 Ves. Sen. 157, and *Brownsword v. Edwards*, 2 id. 243-246, it is held that a sentence in divorce cases may be impeached for fraud. So in *Harrison v. South Hampton*, 17 Law & Eq. 364, it was distinctly held that a sentence of an ecclesiastical court, pronouncing a marriage to be a nullity because one of the parties was within the age of consent and consent not given, would be itself a nullity when obtained by collusion.

So the doctrine that a decree of divorce may be impeached for

Adams v. Adams.

fraud is recognized in *Borden v. Fitch*, 15 John. 121, and in *Harding v. Aiden*, 9 Greenl. 151, and *Kerr v. Kerr*, 41 N. Y. 272. The counsel for the libellee have cited the cases of *Greene v. Greene*, 2 Gray, 361, and *Parish v. Parish*, 9 Ohio St. 534.

But the case of *Greene v. Greene* merely decides that on an original bill filed at a subsequent term a decree of divorce will not be set aside for fraud and false testimony, and distinctly declines to give an opinion on the point whether such decree is open to any revisal by review, writ of error, *certiorari*, or any other proceeding in the nature of an appeal, the court taking the ground that such decree, when the court has jurisdiction, is conclusive between the parties unless revised on some legal proceeding instituted directly for that purpose, although third persons might be allowed to attack it collaterally. And besides, it would seem that *Greene v. Greene* has been overruled in Massachusetts in *Edson v. Edson*, referred to in Bennett & Holland's Mass. Dig., vol. 3, p. 233.

The case of *Homer v. Fish*, 1 Pick. 435, was cited and relied upon. In that case a suit was brought to recover back a sum of money paid by the plaintiff to satisfy a judgment recovered on a policy of insurance, upon the ground that the judgment was obtained by fraud; but the court held that the judgment, so long as it was unreversed, was a bar to the recovery; and the court cites with approval the decision of the court in *Peck v. Woodbridge*, 3 Day, 36, that a man cannot collaterally impeach or call in question a judgment of a court of law or decree in equity to which he is a party.

It can only be done directly, by writ of error, petition for new trial, or bill in chancery.

These cases lend no aid to the position that a party to a decree of divorce cannot, in any form, impeach it for fraud.

The Ohio case of *Parish v. Parish* was an original bill in equity to set aside a decree of divorce, on the ground that it was obtained by fraud and perjury, and alleging also that the libellant had suppressed the paper which contained notice of the suit.

A demurrer to the bill was sustained, and the reasoning goes to the extent of holding that the decree was absolutely conclusive, and not subject to be impeached, even for fraud. Some stress was placed upon their statute, which provided that such decree should be final and conclusive—the court holding it, however, to be in accordance with general policy. The result in this case is like that in *Greene v. Greene*, 2 Gray, 261, but, unlike that case, it does not

Adams v. Adams.

apparently leave open the question whether in some form, by review or other proceeding brought directly to reverse the decree, it ought not to be done.

To the reasoning in this case we cannot subscribe, and we think it is opposed both to principle and authority. It is essential, indeed, to the due administration of justice that courts should have the power to protect themselves and their suitors against fraud and imposition.

Of course this power will always be exercised with great caution, and especially after a long lapse of time, and after changes in the *status* of persons upon the faith of decrees in cases like this.

In the case before us the libellee offers to prove that she had no notice of the pendency of the suit, and that the libellant, knowing her residence, caused the notice to be published in a newspaper that he had every reason to believe neither she nor her friends would see, for the purpose of concealing from her any notice of the proceedings, and that the divorce was obtained by fraud and perjury. Should it be made to appear that the libellant, knowing where the libellee resided, fraudulently caused the notice to be published in a paper not likely to be seen by her or her friends with the purpose of preventing the notice reaching her, and that the artifice was successful, the court ought not to hesitate to treat it as no notice at all and no real compliance with the requisitions of the statute. The order of notice may have been complied with, but if fraudulently procured, with the very purpose of avoiding the giving of actual notice, it ought to be regarded as what it really is, no notice at all.

Upon the other point, that the divorce was obtained by fraud and perjury, it ought also to appear that the cause of divorce alleged had in fact no existence; but, as no definitive judgment is to be rendered, but only to determine how far testimony of this character is admissible, it is unnecessary to examine further the sufficiency of the offer. The great question is, whether, after this lapse of time, this decree can be set aside or vacated for fraud and imposition; and on that point we are clear that it may be if the proofs are clear.

These views must not be understood to give any countenance whatever to the idea that there may be a re-trial, merely, of a divorce suit on the allegation of fraud. On the contrary, the proof of fraud of a grave character ought to be clear; and the court would be slow to reverse a decree of divorce. when the libellee

Boothby v. Plaisted.

appeared, or had due and actual notice to appear, unless fraud of a serious character is established.

No objection is made in respect to the form of the application here, and we therefore assume that it is in writing, as it ought to be, setting forth fully the grounds of the application.

Case discharged.

BOOTHBY V. PLAISTED.

(51 N. H. 432.)

Illegal contract — lex loci contractus.

Defendant ordered, by sample, spirituous liquors of the traveling agent of a firm in another State where the sale was lawful, and they were put up marked to purchaser and shipped from the firm's place of business. *Held*, that the sale was made and the contract complete at the place of shipment, and that an action for the price could be maintained in New Hampshire.*

ASSUMPSIT brought by James L. Boothby and another to recover for goods sold and delivered against Sidney G. Plaisted. The claim was \$361 for spirituous liquors. Plaintiffs were wholesale liquor dealers in the city of New York, and defendant a retail dealer in Portsmouth, N. H. Deposition of Samuel L. Boothby, one of the plaintiffs, was taken by commission, from which it appeared that the transaction with defendant took place July 14, 1870; when plaintiffs sold and delivered to him at 110 Liberty street, New York city, one barrel Bourbon whisky, one barrel old Bourbon, and one-quarter pipe of Phoenix gin for \$361. That the sale was negotiated through one Hunt, who had authority to solicit orders for goods to be sold and delivered in New York subject to plaintiff's approval.

Hunt was plaintiff's traveling agent, he called on defendant at Portsmouth, N. H., July 8, 1870, with samples of liquors, took his order for same quality as samples, and agreed that he might examine them when they arrived, and if not like the samples need not accept them. The goods were packed and shipped from New York by the plaintiffs and were received and used by defendant.

* See *Hul v. Spear*, 9 Am. R. 208.

Boothby v. Plaisted.

There being no material fact in dispute, the court directed a verdict for the plaintiffs for the price of the liquors, which the defendant moved to set aside.

Frink & Butler, for plaintiffs.

Hatch & Page, for defendant.

SARGENT, J. In all respects save one, this sale of liquors stands upon the same foundation as the numerous cases reported in our State. That exception is the fact that the defendant, "after the liquors arrived at his store, might examine them, and if not according to sample he need not accept the same." But waiving that part of the contract for the present, this case, aside from that, presents the same features of numerous other cases where there was a contract for a sale of liquors made in New Hampshire, but the completed sale (completed by separating the liquors from a larger mass and setting them apart for the defendant, marking and directing them, and then by *delivery* at the place agreed on) was in another State. The charge for cartage is waived by plaintiff; and the case finds that the defendant paid the freight from New York. *Banchor v. Warren*, 33 N. H. 183; *Smith & Lougee v. Smith*, 27 id. 244; *Woolsey v. Bailey*, id. 219; *Gassett v. Godfrey*, 26 id. 415; *Garland v. Lane*, 46 id. 248; *Butler v. Northumberland*, 50 id. 33.

But we cannot see that the additional provision as to acceptance is any thing more than the law implies in every contract where a sale is made by sample or with warranty, except that in this case it was agreed that the defendant should decide for himself whether or not the goods were according to the sample; and he certainly cannot be heard to object that he himself was made the umpire, and has by his own acts decided the case in favor of the plaintiffs.

His accepting and using the goods is sufficient proof that they were considered to be according to sample; and if they were according to the sample, then he had no right or power under the contract to refuse to receive them.

What questions might have arisen had the defendant in fact refused to receive them, it is not important here to determine. Here was a contract for a sale and delivery in New York of a certain description of goods as per sample. If the plaintiffs performed their part of the contract fully by delivering at the time

and place agreed the articles which they agreed to furnish, then it became at once the property of the defendant, and he would ordinarily have no right to refuse to accept it. Ordinarily it would be a question for the jury to settle, whether the goods delivered were according to contract or like the sample. But in this case the parties agreed that that fact should be referred to the defendant, and he has decided the case in favor of the plaintiff.

The defendant might refuse to accept if the article was not such as the plaintiffs had sold him. He was at liberty to refuse to receive an article which he had not bought or agreed to take. But the article in this case which was sold was delivered and was accepted, and we think the contract binds the defendant from the time the goods were delivered.

A case in point is *Gibson v. Stevens*, 8 How. (U. S.) 401, where there was a guarantee that certain goods sold should bear inspection. In that case the price had been paid and a bill of sale of the goods taken, but no delivery of the goods had been made, they were left in the hands of the vendor. TANEY, C. J., in the opinion, says, "The guarantee that the articles should pass inspection does not affect the character of the transaction, or convert it into an executory contract. It is nothing more than the usual warranty of the soundness and quality of the thing sold, which is taken in every sale of personal property where the purchaser does not choose to take the risk upon himself." 2 Kent's Com. 480; 1 Parsons on Cont. 593; 1 Smith's Lead. Cas. 308; *Vincent v. Germond*, 11 Johns. 283.

As to the questions and answers in the plaintiff's deposition, they are clearly competent as they stand. The witness states the matter as something within his own knowledge, and if so, the facts stated are all competent and proper. But it is urged that it must be inferred from the facts stated in the case that the witness did not know the facts contained in the answers except by hearsay. But we think no such inference necessarily follows from the facts stated in the case. Upon this point, however, the case of *Dickinson v. Love*, 35 N. H. 9, 17 and 18, is in point, and is entirely conclusive

Judgment on the verdict.

Batchelder v. Keniston.

BATCHELDER V. KENISTON.

(51 N. H. 406.)

Alluvial land — new shore — rule of division.

Where a new shore is formed on a river not navigable, by the alluvial deposits taken from the opposite side by the wearing away of the stream, the land on the new shore is to be divided between the owners entitled to it, according to the following rule: "Give to each owner a share of the new shore line in proportion to what he held in the old shore line and complete the division of the land by running a line from the bound between the parties on the old shore to the point thus ascertained on the new."

ACTION by Clark G. Batchelder against John Keniston, to recover a parcel of land, recently formed by alluvial deposit, along the shore and in the bed of the Pemigewasset river in Plymouth. The stream at the point in question originally made a bend nearly at right angles from a westerly to a southerly course; but by a wearing away of the shore on the inside of the bend its course is now south-westerly, and the deposits have been made on the north-westerly side forming the land in dispute. "A brook or small stream flowing from a north-westerly direction entered the river as it formerly ran at the point of the angle or bend above mentioned, and now enters the old bed of the river at or near the same point, and flowing southerly enters said river as it now runs southerly of the land in dispute, as shown on the plaintiff's original plan used on the trial. Said plan may be used and referred to at the argument."

It was admitted, for the purpose of the argument, that when the formation began plaintiff owned and still owns on the westerly side below the bend, and that defendant owned and now owns on the northerly side above the bend. Both claim the alluvion as their own. The question submitted is, which party is the owner of all and if neither, what is the rule of division?

Leverett & Blair and Carpenter, for plaintiff.

Pike & Blodgett and Burrows, for defendant.

BELLOWS, C. J. At the point where the land in question was formed, the river originally ran westerly some distance, and then,

turning nearly at a right angle, ran in a southerly direction. On the northerly side of the bend was the defendant's land, and on the westerly side the plaintiff's.

By the gradual wearing away of the bank on the southerly side of the river and the deposits on the other side, the land in question was formed against the lands of the plaintiff and the defendant. Had the ancient bed of the river been straight against the lands of the parties, each would have taken the newly formed lands in front of him by lines perpendicular to the general course of the river at that point; but the difficulty here arises from the fact that the river turns and forms nearly a right angle near the line between the parties. The case of *Deerfield v. Arms*, 17 Pick. 41, was much like the present. There the new land was formed in a bend of the Deerfield river, and the parties owned lands on each side of the bend, divided in a manner similar to the present case. It was held that each owner was entitled to a share of the alluvial deposit, to be ascertained in this way: Give to each owner a share of the new shore line in proportion to what he held in the old shore line; that is, if the old shore line was two hundred rods in length, A's share being one hundred and fifty rods and B's fifty, and the new shore line is but one hundred rods in length, then A would take seventy-five rods and B twenty-five rods of that line; and then the division of the land would be completed by running a line from the bound between the parties on the old river bank to the point thus determined on the newly formed shore or river bank. SHAW, C. J., says this rule is found in a work on the civil law — "A collection of new decisions by Denisart," published in France. This rule seems to have been extensively recognized as just and convenient. It goes upon the ground that in making a division of such alluvian, two objects should be kept in view, namely, to give each proprietor a fair share of the land, and to secure to him access to the river by giving him a share of the bank in proportion to the share of the original share owned by him. *Deerfield v. Arms*, before cited. The rule is recognized in Angell on Tide Waters, 258, 259, and cases cited; Angell on Water-courses, §§ 55, 56. The rule, in fact, is substantially upon the same principle as that which governs the division of flats, in the case of a cove the mouth of which is of less width than the uplands to which the flats belong. And there the lines are to be run from the divisional lines of the several owners of the upland to low-water

mark, converging toward each other, so as to give each proprietor his proportionate share of the flats. If the mouth of the cove is of the same width as the upland, then the divisional lines should be parallel, and at right angles with a line drawn across the mouth of the cove. This rule was recognized and adopted in *Rust v. Boston Mill Corporation*, 6 Pick. 167, 168; also, in *Sparhawk & Wife v. Bullard*, 1 Metc. 107; *Valentine v. Piper*, 22 Pick. 96; *Gray v. Deluce*, 5 Cush. 12. The same rule is laid down and recognized in *Angell on Tide Waters*, 232, and cases cited. The present case, indeed, involves the same principle, and the rule for dividing flats in a cove between the proprietors, by the upland, applies here.

The titles of the plaintiff and the defendant extended originally to the thread of the river. As the bed of the river gradually changed by the wearing away of the opposite bank, and the deposit of the material on the lands of the plaintiff and the defendant, the line of their land still continued to be the thread of the stream in its new bed, and the new land is formed by deposits upon the flats belonging to the several parties, which flats are extended as the river recedes; and as the extent of the shore line was diminished by the river cutting across instead of going round this bend, the case obviously stands like a division of flats in a cove where at its mouth it is narrower than the upland, or, rather, where the circular line of the upland is greater than a line across the mouth of the cove.

It is urged that a brook which formerly entered the old channel of the river near the bend must be regarded as the present boundary of the plaintiff's land, or at least, that he cannot go beyond it; and the counsel refer to the case of *Sparhawk & Wife v. Bullard*, 1 Metc. 97. In that case the inquiry was to the extent of the defendant's title to flats, under the ordinance of 1641, which gave to the owner of the upland the flats to low-water mark, provided the tide did not ebb more than one hundred rods; and it was held that if there was a creek from which the tide did not ebb, when, from natural causes, it ebbed the lowest, this would constitute the boundary of the flats—the object of the ordinance being to give to the proprietors of the upland, wharf-privileges extending to low-water mark. Of course such creek was not regarded as the boundary between individual land-owners, but the general boundary of the flats, and has no bearing upon the question before us. In respect to the brook here, it does not appear that it constituted the boundary between the plaintiff's and the defendant's land. If it did, another

question might arise, upon which we do not feel called upon to enter. The brook originally entered the river on the defendant's land. As before suggested, the parties owned the soil constituting the bed of the river, in front of their lands, to its thread; and as the river receded by degrees, it still constituted their boundary, and their title was extended to the thread of the stream in its new bed. Consequently, the alluvial deposits formed upon these flats or bed of the river became the property of these riparian owners, to be divided between them according to the rules established in such cases. It should be observed, also, that it is immaterial whether this alluvion forms upon or against the shore, so as to cause an extension of the bank toward the river, or whether it forms in the bed of the river and becomes an island. In the latter case, such island will be divided between the proprietors of the opposite sides of the river according to the thread of the river, subject, however, it may be, to be changed by a change in the river bed.

These views go upon the assumption that these riparian owners go to the thread of the river. They of course would not be applicable if the plaintiff were bounded by a brook or other monument short of the bank, and not by the river itself.

It is urged that the true rule is to go from the old corner to the river at the nearest point, which, in some instances, would not only give the riparian owner no part of the alluvion against his own land, but, in fact, deprive him of some of the land, that is, the river bed he had before owned.

This we cannot subscribe to, even if some authority is found to support it, as in the case of *Newton v. Eddy*, 23 Vt. 319, which gives no satisfactory reason for the decision — from which REDFIELD dissented, and gave reasons much more satisfactory for his views. Upon principle as well as authority, we are fully satisfied that the rule we have laid down is, in general, the sound and equitable rule, and will do justice to the parties. There can be nothing clearer, as a principle of justice, than that the riparian owner is entitled to the alluvial deposits formed against his own land by imperceptible degrees. If the alluvion is formed so that on account of a bend in the river it would be against or on the land of two proprietors, it should be fairly and equitably divided between the two owners, and not by any arbitrary rule given all to one. This equitable division will, in general, be accomplished by the rule we have stated. It

Eaton v. Boston, Concord & Montreal Railroad.

would require a great weight of authority to establish the contrary rule, and such weight of authority we do not find.

A commissioner should be appointed, then, unless other facts are to be shown, to make a survey and measurement in accordance with these suggestions, and to furnish an accurate plan of the survey, as in *Sparhawk & Wife v. Bullard*, 1 Metc. 108.

It should be observed that the rule we have suggested may in some cases require some modification; but, so far as the case is now disclosed to us, we think it will do justice to the parties.

Case discharged.

EATON V. BOSTON, CONCORD & MONTREAL RAILROAD.

AIKEN V. SAME.

(51 N. H. 504.)

Railroads — release of damages. Constitutional law — "taking of property," — legislative authority — Consequential damages.

A person released a railroad corporation from all claim of damages on account of the construction of the road over his land. *Held* not to operate against his claim for damages resulting from the road's being built over the land of another.

A railroad company claiming authority from the legislature, cut through a ridge near plaintiff's lands, and as a result thereof, such lands were flooded by freshets when they had formerly been protected from them. *Held*, that this was taking of the property of plaintiff within the meaning of the constitution, and that the legislature could not authorize the same without providing for compensation, and that due care and prudence in the construction of the road where the barrier was broken down would not protect the company.

ACTIONS against the Boston, Concord and Montreal Railroad Company, one by Ezra B. Eaton, and one by Milo Aiken, each for damages resulting to their farms by freshet October, 1869, and occasioned by the construction of defendants' road.

Defendants are duly incorporated, and built their road across plaintiffs' farms in the years 1849, 1850 and 1851, for which damages were assessed and paid. Each of the plaintiffs gave defendant a

warranty deed of those portions of their respective farms over which its road was constructed, and each, for full consideration, released the company from all claim of damages on account of the construction of the road across their said farms.

Northerly of plaintiffs' said farms, consisting of meadows lying on Baker's river, is a narrow ridge of land twenty-five feet or more high, extending east and west between the river and the highlands, and effectually protecting the meadow farms from freshets. A small part of the ridge is included in Aiken's farm, which lies between the ridge and Eaton's farm on the south. Defendants, in constructing their road, made a deep cut through the ridge, through which, when a freshet occurred, the waters of the river frequently flowed and carried sand, gravel, debris, etc., in and upon Aiken's land, and over and across it upon Eaton's land. Plaintiffs claim that irrespective of any care and skill of construction of the road and cut in the ridge, defendants are liable for damage occasioned thereby; but defendants insist that they are only bound to the exercise of ordinary and reasonable care to render the property adjoining safe, and that they are not insurers against all damage.

The parties consented that the foregoing questions be determined by the court, and that afterward either party may have a trial by jury if desired, without prejudice from any thing herein contained.

Upon the foregoing facts appearing, and the parties having stated their positions and claims, the court, *pro forma*, ruled that the plaintiffs would be entitled to recover such damages as have been caused them in consequence of the defendants' cutting away the ridge north of the plaintiffs' farms, and thereby letting the river in times of freshet run through this cut and damage the plaintiffs' land; to which ruling the defendants excepted.

Carpenter and Flanders, for plaintiffs.

H. Bingham, Burrows and Page, for defendants.

SMITH, J. Eaton's case will be considered first.

It is virtually conceded that, if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action. It seems to be assumed that the freshets were such as, looking at the history of

•

Eaton v. Boston, Concord & Montreal Railroad.

the stream in this respect, might be "reasonably expected occasionally to occur." The defendants removed the natural barrier which, therefore, had completely protected the plaintiff's meadow from the effect of these freshets; and, for the damages caused to the plaintiff in consequence of such removal, the defendants are confessedly liable, unless their case can be distinguished from that of the private land-owner above supposed. Such a distinction is attempted upon two grounds, first, that the plaintiff has already been compensated for this damage, it being alleged that the defendants have, by negotiation, or by compulsory proceedings, purchased of the plaintiff the right to inflict it; second, that the defendants are acting under legislative authority, by virtue of which they are entitled to inflict this damage on the plaintiff without any liability to compensate him therefor.

In support of the first ground, the defendants rely upon the plaintiff's release, and upon the appraisal of damages under the statute.

The release does not support the defendants' claim. The plaintiff released the defendants from damages on account of the laying out of the railroad through and over his land. The damages which the court ruled that the plaintiff would be entitled to recover were not occasioned by the laying out of the road over the plaintiff's land, but by the construction of the road over the land of other persons. See *Delaware and Raritan Canal Co. v. Lee*, 2 Zab. 243. The ruling was, that the plaintiff could recover such damages as have been caused him in consequence of the defendants' cutting away the ridge north of the plaintiff's farm.

[The court then decided that under the statutes existing at the time, the assessors had no authority to award or include damages to plaintiffs for the construction of the road over the land of another.]

The defendants' first position is, that the plaintiff has already received compensation for this damage. This position the court have now overruled. The defendants' next position is, that the plaintiff is not legally entitled to receive any compensation, but is bound to submit to the infliction of this damage without any right of redress. The argument is not put in the precise words we have just used, but that is what we understand them to mean. The defendants say that the legislative charter authorized them to build the road, if they did it in a prudent and careful manner; that they constructed the road at the cut with due care and prudence: and

that they cannot be made liable as tort-feasors for doing what the legislature authorized them to do. This involves two propositions: first, that the legislature have attempted to authorize the defendants to inflict this injury upon the plaintiff without making compensation; and second, that the legislature have power to confer such authority. There are decisions which tend to show that the charter should not be construed as evincing any legislative intention to authorize this injury, or to shield the defendants from liability in a common-law action. *Tinsman v. Belvidere Delaware R. R. Co.*, 2 Dutcher (N. J.), 148; *Sinnickson v. Johnson*, 2 Harr. (N. J.) 129; *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; *Fletcher v. Auburn & Syracuse R. R. Co.*, 25 Wend. 462; *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 N. Y. (2 Kern.) 486, 491. See, also, *Eastman v. Company*, 44 N. H. 143, 160; *Hooksett v. Company*, id. 105, 110; *Company v. Goodale*, 46 id. 53, 57; BARROWS, J., in *Lee v. Pembroke Iron Co.*, 57 Me. 481, 488. But we propose to waive inquiry on this point, and to consider only the correctness of the second proposition, or, in other words, the question of legislative power.

The defendants cannot claim protection under an implied power, where an express power would be invalid: the legislature cannot do indirectly what they cannot do directly. Unless an express provision in the charter, authorizing the infliction of this injury without making compensation, would be a valid exercise of legislative power, the defendants cannot successfully set up the plea that the injury was necessarily consequent upon the exercise of their chartered powers, and therefore impliedly authorized. The defense, then, really presents this question: Have the legislature power to authorize the railroad corporation to divert the waters of the river, by removing a natural barrier, so as to cause the waters "sometimes in floods and freshets" to flow over the plaintiff's land, "carrying sand, gravel, and stones" upon his farm, without making any provision for his compensation?

Although the constitution of this State does not contain, in any one clause, an express provision requiring compensation to be made when private property is taken for public uses, yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the State, that the legislature cannot constitutionally authorize such a taking without compensa-

Eaton v. Boston, Concord & Montreal Railroad.

tion. *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35, 66, 70; PERLEY, C. J., in *Petition of Mount Washington Road Co.*, 35 id. 134, 141, 142; SARGENT, J., in *Eastman v. Amoskeag Manuf. Co.*, 44 id. 143, 160; *State v. Franklin Falls Co.*, 49 id. 240, 251. The counsel for the defendants have not been understood to question the correctness of this interpretation of the constitution.

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read: "No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable."

To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various State constitutions.

In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right * * * over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." SELDEN, J., in *Wynehamer v. The People*, 13 N. Y. 378, 433; 1 Blackstone's Com. 138; 2 Austin on Jurisprudence (3d ed.), 817, 818.

If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," *pro tanto*, the owner's "property." The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of user necessarily includes the right and power

of excluding others from using the land. See 2 Austin on Jurisprudence (3d ed.), 836 ; WELLS, J., in *Walker v. O. C. W. R. R.*, 103 Mass. 10, 14.

From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's "property." If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property" — although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right ; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a "taking of property." Why not the former ?

If, on the other hand, the land itself be regarded as "property," the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting ; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, "in its corporeal substance and entity," is "property," still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See COMSTOCK, J., in *Wynehamer v. The People*, 13 N. Y. 378, 396. A physical interference with the land, which substantially abridges this right, takes the owner's "property" to just so great an extent as he is thereby deprived of his right. "To deprive one of the use of his land is depriving him of his land ;" for, as LORD COKE said, "What is the land but the profits thereof?" SUTHERLAND, J., in *People v. Kerr*, 37 Barb. 257, 399 ; Co. Litt. 4 b. The private injury is

Eaton v. Boston, Concord & Montreal Railroad.

thereby as completely effected as if the land itself were "physically taken away."

The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip of four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part "is as much forbidden by the constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same." See 6 Am. Law Review, 197, 198; LAWRENCE, J., in *Nevins v. City of Peoria*, 41 Ill. 502, 511.

The explicit language used in one clause of our constitution indicates the spirit of the whole instrument: "No part of a man's property shall be taken * * * ." Const. of N. H., Bill of Rights, art. 12. The opposite construction would practically nullify the constitution. If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value.

The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession; second, it would clearly be actionable if done by a private person without legislative authority. The damage is "consequential," in the sense of not following immediately in point of time upon the act of cutting through the ridge; but it is what Sir WILLIAM ERLE calls "consequential damage to the actionable degree." See *Brand v. H. & C. R. Co.*, Law Reports, 2 Queen's Bench, 223, 249.

These occasional inundations may produce the same effect in preventing the plaintiff from making a beneficial use of the land as

would be caused by a manual asportation of the constituent materials of the soil. Covering the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner. If it be said that the plaintiff still has his land, it may be answered, that the face of the land does not remain unchanged, and that the injury may result in taking away part of the soil ("and, if this may be done, the plaintiff's dwelling-house may soon follow"); and that, even if the soil remains, the plaintiff may, by these occasional submergings, be deprived of the profits which would otherwise grow out of his tenure. "His dominion over it, his power of choice as to the uses to which he will devote it, are materially limited." BRINKERHOFF, J., in *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, 346.

The nature of the injury done to the plaintiff may also be seen by adverting to the nature of the right claimed by the defendants. The primary purpose of the defendants in cutting through the ridge was to construct their road at a lower level than would otherwise have been practicable. But, although the cut was not made "for the purpose of conducting the water in a given course" on to the plaintiff's land, it has that result; and the defendants persist in allowing this excavation to remain, notwithstanding the injury thereby visibly caused to the plaintiff. Rather than raise the grade of their track, they insist upon keeping open a canal to conduct the flood waters of the river directly on to the plaintiff's land. If it be said that the water came naturally from the southerly end of the cut on to the plaintiff's land, the answer is, that the water did not come naturally to the southerly end of the cut. It came there by reason of the defendants having made that cut.

In consequence of the cut, water collected at the southerly boundary of the ridge, north of the plaintiff's farm, which would not have been there if the ridge had remained in its normal and unbroken condition. They have "so dealt with the soil" of the ridge, that, if a flood came, instead of being held in check by the ridge, and ultimately getting away by the proper river channel without harm to the plaintiff, it flowed through where the ridge once was on to the plaintiff's land. "Could the defendants say they were not liable because they did not cause the rain to fall," which resulted in the freshet; or because the water "came there by the attraction of gravitation?" See Baron BRAMWELL, in *Smith v. Fletcher*, Law Rep., 7 Exch. 305, 310. If the ridge still remained in its natural

Eaton v. Boston, Concord & Montreal Railroad.

condition, could the defendants pump up the flood water into a spout on the top of the ridge, and thence, by means of the spout, pour it directly on to the plaintiff's land? If not, how can they maintain a canal through which the water, by the force of gravitation, will inevitably find its way to the plaintiff's land? See AMES, J., in *Shipley v. Fifty Associates*, 106 Mass. 194, 199, 200; CHAPMAN, C. J., in *Salisbury v. Herchenroder*, 106 id. 458, 460.

To turn a stream of water on to the plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and "dig a ditch, or deposit upon them a mound of earth." See LAWRENCE, J., in *Nevins v. City of Peoria*, 41 Ill. 502, 510; DIXON, C. J., in *Pettigrew v. Village of Evansville*, 25 Wis. 223, 231, 236.

The defendants may, perhaps, regret that they cannot maintain their track at its present level without thereby occasionally pouring flood water on to the land of the plaintiff. Indeed, the passage of this water through the cut may cause some injury to the defendant's road-bed. But the advantages of maintaining the track at the present grade outweigh, in the defendants' estimation, the risk of injury by water to themselves and to the plaintiff.

In asserting the right to maintain the present condition of things as to the cut, the defendants necessarily assert the right to produce all the results which naturally follow from the existence of the cut. In effect, they thus assert a right to discharge water on to the plaintiff's land. Such a right is an easement. A right of "occasional flooding" is just as much an easement as a right of "permanent submerging;" it belongs to that class of easements which "are, by their nature, intermittent—that is, usable or used only at times." See Goddard's *Law of Easements*, 125.

If the defendants had erected a dam on their own land across the river below the plaintiff's meadow, and by means of flash-boards thereon had occasionally caused the water to flow back and overflow the plaintiff's meadow so long and under such circumstances as to give them a prescriptive right to continue such flowage, the right thus acquired would unquestionably be an "easement." The right acquired in that case does not differ in its nature from the right now claimed. In the former instance, the defendants flow the plaintiff's land by erecting an unnatural barrier below his premises. In the present instance, they flow his land by removing a natural barrier on the land above his premises. In both instances, they

Eaton v. Boston, Concord & Montreal Railroad.

flow his land by making "a non-natural use" of their own land. In both instances, they do an act upon their own land, the effect of which is to restrict or burden the plaintiff's ownership of his land (see *Leconfield v. Lonsdale*, Law Rep., 5 Com. Pl. 657, 696); and the weight of that burden is not necessarily dependent upon the source of the water, whether from below or above. See BELL, J., in *Tillotson v. Smith*, 32 N. H. 90, 95, 96. In both instances they turn water upon the plaintiff's land, "which does not flow naturally in that place." If the right acquired in the former instance is an easement, equally so must be the right claimed in the latter. If, then, the claim set up by the defendants in this case is well founded, an easement is already vested in them. An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation? See BRINKERHOFF, J., *ubi sup.*; SELDEN, J., in *Williams v. N. Y. Central R. R.*, 16 N. Y. 97, 109.

An easement is all that the railroad corporation acquire when they locate and construct their track directly over a man's land. The fee remains in the original owner. *Blake v. Rich*, 34 N. H. 282. Yet nobody doubts that such location and construction is a "taking of property," for which compensation must be made. See REDFIELD, J., in *Hatch v. Vermont Central R. R.*, 25 Vt. 49, 66. What difference does it make in principle whether the plaintiff's land is incumbered with stones, or with iron rails? whether the defendants run a locomotive over it, or flood it with the waters of Baker's river? See WILCOX, J., in *March v. P. & C. R. R.*, 19 N. H. 372, 380; WALWORTH, Chan., in *Canal Commissioners and Canal Appraisers v. The People*, 5 Wend. 423, 452.

If it should be held that the legislature had conferred a valid authority upon the defendants to make this out, if necessary to the construction of the railroad, or if made with care and skill, the question of necessity or of care would become material, and might have

Eaton v. Boston, Concord & Montreal Railroad.

to be decided by a jury. See *Johnson v. Atlantic and St. L. R. Co.*, 35 N. H. 569; *Estabrooks v. P. & S. R. Co.*, 12 Cush. 324; *Mellen v. Western R. R.*, 4 Gray, 301; *Curtis v. Eastern R. R.*, 14 Allen, 55; S. C., 98 Mass. 428. But in the view now taken, these questions are immaterial. The defendants are not held liable, as in some other cases, because their acts were unnecessary, or unskillful, and hence not within the contemplation of the charter. They are held liable, irrespective of any negligence on their part, on the ground that it was beyond the power of the legislature to authorize the infliction of this injury on the plaintiff, without making provision for his compensation.

We think that here has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that the ruling of the court was correct. These conclusions, which are supported by authorities to which reference will soon be made, seem to us so clear, that, if there were no adverse authorities, it would be unnecessary to prolong the discussion of this case. But as there are respectable authorities which are in direct conflict with these conclusions, it has been thought desirable to examine some arguments which have, at various times, been advanced in support of the opposite view.

In some instances, as soon as it has been made to appear that there is a legislative enactment purporting to authorize the doing of the act complained of, the complaint has been at once summarily disposed of by the curt statement "that an act authorized by law cannot be a tort." This is begging the question. It assumes the constitutionality of the statute. If the enactment is opposed to the constitution, it is "in fact no law at all." "The term *unconstitutional law*, in American jurisprudence, is a misnomer and implies a contradiction." "The will of the legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen." Cooley's Constitutional Limitations (1st ed.), 3, 4.

The error in question originates in a "fallacy of reference." It arises from following English authorities, without advertent to the immense difference between the practically omnipotent powers of the British parliament and the comparatively limited powers of our State legislatures, acting under the restrictions of written constitu-

Eaton v. Boston, Concord & Montreal Railroad.

tions. Parliament is the supreme power of the realm. It is at once a legislature and a constitutional convention. 1 De Tocqueville's *Democracy in America* (Reeves' translation, 2d Am. ed.), 80. Parliament can "do every thing that is not naturally impossible;" and what it does "no power on earth can undo." 1 Black. Com. 161; 4 Coke's Inst. 36.

A State legislature, on the other hand, "is powerless when it attempts to pass the limits prescribed by the constitution." See Cooley's *Const. Lim.* (1st ed.) 45, 46. In England, whenever it appears that the act complained of was authorized by a parliamentary statute, the court are perfectly justified in dismissing the complaint, on the ground that the act was "authorized by law." In this country, when it appears that the legislature have gone through the form of enacting a statute purporting to authorize the act complained of, the further inquiry remains whether the legislature had the constitutional power to pass such a statute. If they had not, then their enactment is not "law," and can afford no justification.

The error of blindly following English authorities, as to the justification afforded by statutory enactments, has repeatedly been exposed. SWAN, J., in *Crawford v. The Village of Delaware*, 7 Ohio St. 459, 466, 477; MAISON, Senator, in *Bloodgood v. Mohawk and Hudson Railroad Co.*, 18 Wend. 9, 29-31; ARCHER, C. J., in *Barron v. Mayor of Baltimore*, 2 Am. Jurist, 210; SMITH, J., in *Goodall v. City of Milwaukee*, 5 Wis. 32, 38, 45; Cooley's *Const. Lim.* (1st ed.) 85; and see, also, Angell on *Water-courses* (6th ed.), § 461; SUTHERLAND, J., in *People v. Kerr*, 37 Barb. 357, 412, 415; 1 Redf. on *Railways* (4th ed.), 232.

The error in the argument just commented upon may, perhaps, be summed up in the statement, that it confounds the legislature with the constitutional convention. Closely allied to this is the error of confounding the legislature with the supreme court. It seems to have been contended that the legislature is competent to determine whether a franchise will be injurious to other interests, and that it is to be presumed, after a legislative grant, "that there is no just claim for resulting damages which has not been provided for." See *Am. Law Mag.*, vol. 1, No. 1, April, 1843, 58-60. This assumes both the omniscience and omnipotence of the legislature. If the legislators themselves are to finally decide whether they have transcended their constitutional powers, "then," in the words of Daniel

Eaton v. Boston, Concord & Montreal Railroad.

Webster, "the constitution ceases to be a legal, and becomes only a moral, restraint upon the legislature." It "is admonitory or advisory only, not legally binding." * * * Speech on The Independence of the Judiciary, quoted in Cooley's Const. Lim. (1st ed.) 46, note 1. It is now universally conceded to be the province and duty of the judiciary to pass upon the constitutionality of statutes; but it is to be regretted that some courts have manifested excessive reluctance to pronounce statutes unconstitutional. "Whatever respect may be due to the legislature, that due to the constitution is still greater." LAWRENCE, J., in *Bunn v. The People*, 45 Ill. 397, 419. The result has sometimes been "to sacrifice the individual to the community." See Sedgwick on Damages (5th ed.), 121, 122. "It is not," said Mr. Sedgwick, "an agreeable observation to make, but I believe it cannot be denied that the protection afforded by the English government to property is much more complete in this respect than under our system, although parliament claims to be despotically supreme, and although we boast our submission to constitutional restrictions." * * * Sedgwick on Stat. and Const. Law, 523, 524, note. Parliamentary acts, at the present time, usually contain carefully-drawn clauses, scrupulously providing for the indemnity of those who are liable to be injured by the exercise of the powers granted by the act. In this country it too often happens that the legislature neglect to carefully perform this duty, and the failure of the courts to pronounce the act unconstitutional leaves the injured party without remedy. In view of the "form that the constitutional provision has assumed" in the hands of some courts, "it must," said the same author, "be admitted that in practice our constitutional guarantees are very flexible things." * * * Sedgwick on Stat. and Const. Law, 534.

It is said, that "if the legislature is competent to furnish the remedy, there is no denial of justice, though no action can be sustained at law." 1 Am. Law Mag., April, 1843, 57. Leave to apply to a future legislature for an act of indemnity is not the "certain remedy" to which (by article 14 of the Bill of Rights) every subject is entitled "for all injuries he may receive * * * in his property." Besides, "is the obligation to make him compensation any stronger upon a future legislature than it was on that one by whose authority his property has been taken;" and if they have "failed to make a constitutional provision for his compensation," "what assurance can he have" that any future legislature will do so? "It was, however

Eaton v. Boston, Concord & Montreal Railroad.

to place the rights of property upon higher grounds than the mere legislative sense of justice and equity that this prohibition upon legislative power was embodied in the bill of rights." MOORM, J., in *Buffalo B. B. & C. R. R. Co. v. Ferris*, 26 Tex. 588, 602.

It has been contended, that in order to establish the position "that the right of action in behalf of the party injured" is "the same as if no charter existed," "it is necessary to show that the grant" of the franchise "is absolutely void." 1 Am. Law Mag. 64. It is undoubtedly necessary to show that the charter is void, in so far as it purports to authorize the infliction of the injury in question; but not that it is void in all other respects, conferring no valid rights as against any person whatever. If the legislature grant a charter purporting to authorize the grantee to take the property of A for public use upon making compensation, and the property of B without making compensation, the charter is invalid as against B, but may confer a right as against A. It is familiar law that "where an agent exceeds his authority, what he does within it is valid, if that part be distinctly severable from the remainder." 1 Parsons on Contracts (4th ed.), 58. The same principle applies to the exercise by the legislature of the power delegated to them by the constitution. No sound argument can be founded upon the hardship to the grantees of not receiving all that the legislature undertook to convey to them. Conceding that the grantees, by assuming the performance of the duties required of them by the charter, have paid a full consideration for all the privileges which the charter purported to convey to them, how does their case differ from that of other unfortunate persons who have purchased property of an irresponsible party who had no right to sell? Is the fact that the purchaser paid a full consideration to the wrongful vendor allowed to divest the title of the true owner? Yet, upon what other theory can it be said (1 Am. Law Mag. 75) that "we cannot look beyond the charter itself to determine the duties and liabilities of the grantee?"

The consideration is sometimes urged, that the building of a railroad is a work of great public convenience and benefit. This may afford an excellent reason, for taking the plaintiff's land in the constitutional manner, but not for taking it without compensation. If the work is one of great public benefit, "the public can afford to pay for it." GREEN, Chan., in *Hinchman v. Patterson Horse R. R. Co.*, 2 C. E. Green (N. J.), 75, 80; PARKER, C. J., in *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35, 64. "Either, therefore,

Eaton v. Boston, Concord & Montreal Railroad.

the railway ought not to be made, or the damage may well be paid for." BRAMWELL, Baron, in *Brand v. H. & C. Railway Co.*, Law Rep., 2 Q. B. 223, 231. "In the case at bar, the plaintiff is expected to give his land" * * *. "Why is he called upon rather than another?" COLE, J., in *Cash v. Whitworth*, 13 La. Ann. 401, 403. "Taxation exacts money from individuals as their share of a justly imposed and apportioned public burden, and the equivalent is presumptively received in the benefits conferred by the government. Property taken for public use from one or more individuals only, by right of eminent domain, is taken not as his or their share of an apportioned public burden, but as something distinct from and more than his or their share of the public burdens, and therefore the justice and necessity of a constitutional provision for compensation." BUTLER, J., in *Booth v. Town of Woodbury*, 32 Conn. 130; RUGGLES, J., in *People v. Mayor of Brooklyn*, 4 Comst. 419, 424.

In *Street Railway v. Cumminsville*, 14 Ohio St. 523, it was found as a fact, that, taking into consideration the interests of the company and the general traveling public, as well as those of the lot-owners, the location was "as little injurious as it would be in any other part of the highway." "This," said RANNEY, J., p. 550, "is the common case, where private property is taken for public uses. Reduced into plain English, it simply amounts to this, that the company and the public will gain as much as the lot-owners lose. The difficulty of giving this any effect in the present case arises from the fact that the justice of the constitution has provided that what the one thus gains and the other loses shall be paid for, before the property is taken or invaded."

"If," said WILLIAMS, J. [in 3 Bush. (Ky.) 429, 430], "the improvement is of great public utility, it will not be an onerous burden for the public to pay the damage; if so, it would, of course, be a much greater and peculiar burden and hardship on these individual proprietors. If the damages are great, they should not be imposed to the destruction of the individual proprietors. If they are not great, the burden on the public will be light. If too heavy to be imposed on the public, this should admonish the authorities not to impose them on the individual proprietors." WILLIAMS, J., in *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.), 416, 429, 430; and see WILLIAMS, C. J., in *Enfield Toll Bridge Co. v. Hartf. & N. H. R. R. Co.*, 17 Conn. 40, 58, 59.

Eaton v. Boston, Concord & Montreal Railroad.

It is said that a land owner is not entitled to compensation where the damage is merely "consequential." The use of this term, "consequential damage" "prolongs the dispute," and "introduces an equivocation which is fatal to any hope of a clear settlement." It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of; what ERLE, C. J., aptly terms "consequential damage to the actionable degree." *Brand v. H. & C. R. Co.*, Law Rep., 2 Q. B. 223, 249. It is thus used to signify damage which is recoverable at common law in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover it. The terms, "remote damages" and "consequential damages" "are not necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote." Sedgwick on Damages (5th ed.), 56.

When, then, it is said that a land owner is not entitled to compensation for "consequential damage," it is impossible either to affirm or deny the correctness of the statement until we know in what sense the phrase "consequential damage" is used. If it is to be taken to mean damage which would not have been actionable at common law if done by a private individual, the proposition is correct. The constitutional restriction was designed "not to give new rights, but to protect those already existing." *Pierce on Am. R. R. Law*, 173; (and see *Rickett v. Directors, etc., of Metropolitan Railway Co.*, Law Rep., 2 H. of L. 175, 188, 189, 196). But this does not concern the present case, where it is virtually conceded that the injury would have been actionable if done by a private individual not acting under statutory authority. If, upon the other hand, the phrase is used to describe damage, which, though not following immediately in point of time upon the doing of the act complained of, is nevertheless actionable, there seems no good reason for establishing an arbitrary rule that such damage can in no event amount to a "taking of property."

The severity of the injury ultimately resulting from an act is not always in inverse proportion to the lapse of time between the doing of the act and the production of the result. Heavy damages are recovered in case as well as in trespass. The question whether the

Eaton v. Boston, Concord & Montreal Railroad.

injury constitutes a "taking of property" must depend on its effect upon proprietary rights, not on the length of time necessary to produce that effect. If a man's entire farm is permanently submerged, is the damage to him any less because the submerging was only the "consequential" result of another's act? It has been said "that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had a remedy for it by assize of novel disseizin;" but if it be conceded that at present the only common-law remedy is by an action on the case, that does not change the aspect of the constitutional question. The form of action in which the remedy must be sought cannot be decisive of the question whether the injury falls within the constitutional prohibition. "We are not to suppose that the framers of the constitution meant to entangle their meaning in the mazes" of the refined technical distinctions by which the common-law system of forms of action is "perplexed and incumbered." Such a test would be inapplicable in a large proportion of the States, where the distinction between trespass and case has been annihilated by the abolition of the old forms of action. We are not alone in the opinion that the phrase "consequential damage" has been misapplied in some of the discussions on this constitutional question (see the criticisms of MILLER, J., in *Pumpelly v. Green Bay Co.*, 13 Wall. [U. S.] 166, 180; PAINE, J., in *Alexander v. City of Milwaukee*, 16 Wis. 247, 258; SUTHERLAND, J., in *People v. Kerr*, 37 Barb. 357, 403, 408); and we think that the confusion thus engendered will account for some erroneous decisions. If this most ambiguous expression is to be used at all in this connection, the meaning attached to it should always be clearly defined, as is done in *Pierce on Am. Railroad Law*, 173.

It may, perhaps, be urged that a decision in favor of the plaintiff will give rise to a multiplicity of suits by other claimants, many of whom have sustained no substantial damage. But this affords no ground for denying redress to this plaintiff, who has clearly sustained a substantial injury. Nor will the present decision be a precedent in future cases differing in their nature from the one before us. The answers given by other courts to similar objections are quite decisive. *Ld. DENMAN*, C. J., in *Regina v. Eastern Counties Railway Co.*, 2 Q. B. 347, 362, 363; *MONTAGUE SMITH*, J., *Brand v. H. & C. Railway Co.*, *Law Rep.*, 2 Q. B. 223, 245; *PARKER*,

O. J., in *Boston and Roxbury Mill Corp. v. Gardner*, 2 Pick. 33, 38, 39.

Our conclusion, that the second ground of defense set up in this case must be overruled, is supported by *Pumpelly v. Green Bay Co.*, 13 Wall. (U.S.) 166; *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 Ind. 433; and by that part of the decision in *Richardson v. Vt. Central R. R. Co.*, 25 Vt. 465, which holds the plaintiff entitled to recover for damage occasioned by his land falling into the cut. See, also, *Hay v. Cohoes Co.*, 2 N. Y. 159; RANNEY, J., in *Carman v. Steubenville & Indiana R. R. Co.*, 4 Ohio St. 399, 413. In *Hooker v. The New Haven & Northampton Co.*, 14 Conn. 146; S. O., 15 id. 312, it was held that no intent of the legislature to authorize the injury was apparent; but some of the reasoning of WILLIAMS, O. J., tends very strongly to show that an attempt to confer such authority would have been unavailing. See 14 Conn. 151-162; 15 id. 317, 319, 321, 325.

There are also numerous cases in which the decisions, or dicta, tend to sustain the principle of the present decision. *People v. Nearing*, 27 N. Y. 306, 308, 310; BRINKERHOFF, J., in *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, 346 (and see, in this connection, *Tide Water Co. v. Coster*, 3 C. E. Green [N. J.], 158; S. C., 3 id. 34); *In the matter of Bushwick Avenue*, 48 Barb. 9, J. F. BARNARD, J., p. 12; MULLIN, P. J., in *Village of Lancaster v. Richardson*, 4 Lans. 136, 141; *Lee v. Pembroke Iron Co.*, 57 Me. 481, BARROWS, J., p. 488; BIGELOW, J., in *Brigham v. Edmands*, 7 Gray, 359, 363; ZABRISKIE, Chan., in *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co.*, 20 N. J. Ch. (5 C. E. Green) 61, 62; *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162; BECK, J., in *McCord v. High*, 24 Iowa, 336, 342; *Woodruff v. Neal*, 28 Conn. 165; VALENTINE, J., in *U. P. R. W. Co. E. D. v. Rollins*, 5 Kan. 167, 176, 177, and in *Caulkins v. Mathews*, 5 id. 191, 200; *People v. Platt*, 17 Johns. 195; *State v. Glen*, and *Cornelius v. Glen*, 7 Jones' Law (N. C.), 321, 512; *Crenshaw v. Slate River Co.*, 6 Randolph (Va.), 245; *State v. Franklin Falls Co.*, 49 N. H. 240, 251; *State v. Laverack*, 34 N. J. Law (5 Vroom), 201; *Martin, Ex parte*, 8 English (Ark.), 198; *Attorney-General v. Germantown, etc., Turnpike Road*, 55 Penn. St. 466; *Glover v. Powell*, 2 Stockton's Ch. (N. J.) 211; HOAR, J., in *Morse v. Stocker*, 1 Allen, 150, 157, 158; *Moale v. Mayor of Baltimore*, 5 Md. 314, LE GRAND, C. J., pp. 321, 322; see, also, J. C. SMITH, J., in *Morgan v. King*, 35 N. Y. 454, 457; WAL-

Eaton v. Boston, Concord & Montreal Railroad.

WORTH, Chan., in *Canal Comm'rs & Canal Appraisers v. The People*, 5 Wend. 423, 448; *Barclay R. R. & Coal Co. v. Ingham*, 36 Penn. St. 194; BIRCHARD, C. J., in *Walker and Fulton v. Board of Public Works*, 16 Ohio, 540, 544, 545; ELLIOTT, J., in *City of Columbus v. Hydraulic W. M. Co.*, 33 Ind. 435, 438, 439; *Murray v. Sharp*, 1 Bos. 539; *Yates v. Milwaukee*, 10 Wall. 497; E. D. SMITH, J., in *Robinson v. N. Y. & Erie R. R.*, 27 Barb. 512, 522.

Reference may also be made to "the weight of judicial authority" "against the power of the legislature to appropriate a common highway to the purposes of a railroad, unless at the same time provision is made for compensation to the owners of the fee." Cooley's Const. Lim. (1st ed.) 545-547.

This conclusion is also supported by the definitions given by various judges and text-writers to the phrase "a taking of property." See, in addition to the foregoing citations, Angell on Water-courses (6th ed.), § 465 a; Cooley's Const. Lim. (1st ed.) 544; WILDE, J., in *Austin v. Murray*, 16 Pick. 121, 126; PUTNAM, J., in *Boston & Roxbury Mill Corp. v. Newman*, 12 id. 467, 482; NEVIUS, J., in *Ten Eyck v. The Delaware & Raritan Canal Co.*, 3 Harrison (N.J.), 200, 205; *Ex parte Jennings*, 6 Cow. 518, 525, 526; WALWORTH, Chan., and ALLEN, Senator, in *Canal Com'rs & Appraisers v. The People ex rel. Tibbits*, 5 Wend. 423, 452, 456; SUTHERLAND, J., in S. C., 13 id. 355, 372, 373; WALWORTH, Chan., in S. C., 17 id. 571, 605; MAISON, Senator, in *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 id. 9, 34, 35; LEONARD, J., in *Walther v. Warner*, 25 Mo. 277, 289; LAWRENCE, J., in *Nevins v. City of Peoria*, 41 Ill. 502, 509, 511; ARCHER, C. J., in *Barron v. Mayor of Baltimore*, 2 Am. Jurist, 211, 212 (since overruled, see S. C., 7 Peters, U. S., 243, 244); SMITH, J., in *Goodall v. Milwaukee*, 5 Wis. 32, 39, 45, 46; SELDEN, J., in *Williams v. N. Y. Central R. R.*, 16 N. Y. 97, 100, 110; PERKINS, J., in *Wabash & Erie Canal v. Spears*, 16 Ind. 441, 443.

It seems to have been sometimes supposed that the decisions opposed to these views are so numerous, that to differ from them might "almost wear the aspect of presumption." Such appears to have been the opinion of Mr. Sedgwick, who evidently differed, as to the intrinsic merits of the question, from the supposed weight of authority. Sedg. on Stat. & Const. Law (1st ed.), 525, 533, 534. There are, undoubtedly, authorities which are in direct conflict with the present opinion. See, for instance, the decisions in *Bellinger v. N. Y. Central R. R.*, 23 N. Y. 42; *West Branch & Susquehanna Canal*

Eaton v. Boston, Concord & Montreal Railroad.

Co. v. Mulliner, 68 Penn. St. 357; and the *dicta* of GILBERT, J., in *Arnold v. Hudson River R. R. Co.*, 49 Barb. 108, 121 (a case in which the result reached may, perhaps, stand well enough on the finding of fact, that the testator accepted the substituted structure as a compensation from the defendants for all damages sustained by him in consequence of their acts). (See, also, the remark of GIBSON, C. J., that the constitutional prohibition "extends not to the case of property injured or destroyed." *O'Connor v. Pittsburgh*, 18 Penn. St. 187, 190.) But the number of decisions, necessarily inconsistent with the present conclusions, is much smaller than has sometimes been supposed. If we look "to what has been actually decided" in many of the cases rather than "to what has been said," it will be found that the present reasoning would not necessarily have led to a different result.

There are classes or groups of authorities which, upon a superficial examination, might be supposed irreconcilable with our conclusions, but which, in fact, are not in point.

Thus, a petitioner for assessment of damages under a statute may fail to recover damages similar to those claimed here, because the statute did not provide for such a case; but it does not follow that he cannot maintain a common-law action. See *Indiana Central R. Co. v. Boden*, 10 Ind. 96; *Proprietors of Locks & Canals v. Nashua & Lowell R. R. Co.*, 10 Oush. 385, 388; *Estabrooks v. P. & S. R. R. Co.*, 12 id. 224. A petitioner under a statute can get nothing more than the statute gives him. The construction and not the constitutionality of the statute is the point for decision. Nothing else was decided in reference to Bradley's damages in *Kennett's Petition*, 24 N. H. 139, 143. If the case at bar were a petition under the statute, we should hold, as already intimated, that Eaton could not, in that proceeding, recover the damages claimed in this action. On the other hand, a common-law action may fail, because there is a remedy given by statute which is exclusive. *Henniker v. Contoocook Valley R. R.*, 29 N. H. 146; *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466; SHAW, C. J., in *Dodge v. County Com'rs*, 3 Metc. 380, 381, 382. (In *Rowe v. Granite Bridge Corporation*, 21 Pick. 344, it seems to be assumed that there was a statutory remedy for the damage to real estate; see 345, 346, 348.) In Massachusetts the statute provides for an assessment of damages in some cases which are not held to be included in the New Hampshire statutes. Hence, in some instances, an action of tort which would be main-

Eaton v. Boston, Concord & Montreal Railroad.

tainable in this State might be defeated in Massachusetts, upon the ground that there was an exclusive remedy by petition under the statute. See *Babcock v. Western R. R.*, 9 Metc. 553; *Mellen v. Western R. R.*, 4 Gray, 301; *Estabrooks v. Peterborough & Shirley R. R.*, 12 Cush. 224; *Perry v. Worcester*, 6 Gray, 544; *Curtis v. Eastern R. R. Co.*, 14 Allen, 55; S. C., 98 Mass. 428.

So there are cases where the plaintiff fails, not because the act complained of was legal, but because it was a public nuisance—a wrong “to be redressed by a public prosecution, not by recovering damages in a private action,”—the plaintiff’s damage differing “in degree only, not in kind,” from that sustained by the rest of the community.” See, for examples, *Blood v. Nashua & Lowell R. R.*, 2 Gray, 137, 140, 141; also, SHAW, C. J., in *Boston & Worcester R. R. v. Old Colony R. R.*, 12 Cush. 605, 606; BENNETT, J., in *Hatch v. Vt. Central R. R.*, 28 Vt. 142, 147; SUTHERLAND, J., in *Lansing v. Smith*, 8 Cow. 146, 151–168.

Again, there is a class of cases where the plaintiff has failed, not because the damage complained of did not amount to a “taking of property,” but because it was held that in those instances the plaintiff had already been compensated for it,—the courts holding that the damage must, in contemplation of law, be regarded as having been included in the assessment under the statute, or in the purchase-money paid to the plaintiff. Examples of this class of cases may be found in *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Sabin v. Vt. Central R. R.*, 25 Vt. 363; *Norris v. Vt. Cen’l R. R.*, 28 id. 99; *Steele v. Western Inland Lock Nav. Co.*, 2 Johns. 283; *Clark’s Adm’r. v. Hannibal & St. Joseph R. R.*, 36 Mo. 202; *Hortsmann v. Covington & Lexington R. R. Co.*, 18 B. Monroe, 218, 222; *Baltimore & Potomac R. R. v. Magruder*, 34 Md. 79. And see *Babcock v. Western R. R.*, 9 Metc. 553, 556. It seems to us that the decision in *Boothby v. Androscoggin & Ken. R. R.*, 51 Me. 318, might well have been put upon this ground;—see the clear statement of STILES, J., in the somewhat analogous use of *Hortsmann v. Covington & Lexington R. R. Co.*, 18 B. Monroe, 218, 222. The principle of these cases would be applicable here, if the damage complained of had been occasioned by the construction of the railroad over Eaton’s land, instead of over the land of other persons.

There is another class of cases distinguishable from the present by the fact that the complainant in those cases has been deprived

only of the privilege which he had enjoyed, in common with the rest of the public, of using public property. No private or exclusive right is invaded. The act complained of is merely a regulation of a public right. Suppose that the State cause or authorize an obstruction to the navigation of a navigable river which belongs to the State, but do not thereby invade or flood the lands of the riparian owner. The diminished facilities for navigation may render the adjacent land less valuable; but so may a lawful change in the mode of occupying an adjacent tract of land belonging to a private owner. The riparian owner's land remains intact. He is only "deprived of the use of what was never his own." See *Gould v. Hudson River R. R.*, 6 N. Y. 522; S. C., 12 Barb. 616; BARROWS, J., in *Lee v. Pembroke Iron Co.*, 57 Me. 481, 486-488; SHAW, C. J., in *Davidson v. Boston & Maine R. R.*, 3 Cush. 91, 106; STRONG, J., in *People v. Tibbets*, 19 N. Y. 523, 528; FOLGER, J., in *Coster v. Mayor of Albany*, 43 id. 399, 415; *Shrunk, Pres., etc., of Schuylkill Navigation Co.*, 14 Serg. & Rawle, 71; *Zimmerman v. Union Canal Co.*, 1 W. & S. 346; *Commonwealth v. Richter*, 1 Penn. (by Rawle, Penrose and Watts) 462; *Monongahela Bridge Co. v. Kirk*, 46 Penn. St. 112; *Clarke v. Birmingham & Pittsburgh Bridge Co.*, 41 id. 147; *Spring v. Russell*, 7 Greenl. 273 (as explained in 57 Me. 486); 3 Edw. Ch. 290; and see *Commissioners of Homochitto River v. Withers*, 29 Miss. 21; *New York & Erie R. R. v. Young*, 33 Penn. St. 175; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *McKeen v. Delaware Division Canal Co.*, 49 Penn. St. 424. See, however, *Yates v. Milwaukee*, 10 Wall. (U. S.) 497. In the much considered case of *Canal Commissioners and Canal Appraisers v. The People ex rel. Tibbits*, 17 Wend. 571; S. C., 13 id. 355; 5 id. 423, the majority of the court disallowed the relator's claim to compensation for the destruction of the waterfall in the Mohawk river, upon the ground that the bed of the Mohawk belonged to the State, and did not pass under the grant of the adjacent land. To the same effect is the decision in *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461. If any decisions or *dicta* go to the length of asserting that the State, under the guise of regulating or improving public property, may infringe on private rights without compensation (see GIBSON, C. J., in *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101, 113, 114; *Hollister v. Union Co.*, 9 Conn. 436), it is only necessary in this connection to point out that such a doctrine, even if correct, is inapplicable to the present case. The improvement of

Eaton v. Boston, Concord & Montreal Railroad.

Baker's river "was not within the contemplation of the legislature" in granting the defendant's charter, "and no authority for that purpose was given." See GREEN, C. J., in *Tinsman v. Belvidere Delaware R. R. Co.*, 2 Dutch. (N. J.) 148, 175.

The case at bar is clearly distinguishable from the class of cases where an entry on land for a merely temporary purpose has been held not to be a "taking of property;" as, for example, an entry to perambulate the boundaries of towns, or to make preliminary surveys with a view to determining the location of a proposed railroad (see 1 Redf. on Railroads [4th ed.], 240, 241), or "the entry of an officer charged with the execution of criminal process upon the land of a third person for the purpose of making the arrest." In these instances there is only "a technical trespass," and the damage, in general, is merely nominal. The real estate is not "permanently subjected to a servitude." "The beneficial possession of the owner is not substantially interfered with." See *Winslow v. Gifford*, 6 Cush. 327; *Polly v. Sar. & Wash. R. R. Co.*, 9 Barb. 449; WALWORTH, Chan., in *Bloodgood v. Mohawk & Hudson River R. R. Co.*, 18 Wend. 9, 17; BIGELOW, J., in *Brigham v. Edmonds*, 7 Gray, 359, 363; LEONARD, J., in *Walther v. Warner*, 25 Mo. 277, 289. This principle is utterly inapplicable here, where the right is claimed to impose a permanent servitude, and where, if the claim is well founded, the defendants will gain and the plaintiff will lose the title to an easement, thus seeming to bring the case within the definition in the *dicta* of SHEPLEY, C. J., in *Cushman v. Smith*, 34 Me. 247, 258, 260. It was claimed in argument by the plaintiff, and not controverted by the defendants, that the damages in the present cases are of a very substantial character. If it is said that consistency requires a construction of the constitutional provision which would extend it to all invasions of real estate, however momentary, which would be actionable if committed by a private individual, it may be answered that the same reason which induces us to deny that the constitutional restriction is confined to the taking of the formal title, also negatives the idea that it was intended to include injuries which are merely technical and nominal. The real substance of the injury, not its technical name in legal phraseology, is the criterion whereby to determine whether it falls within the constitutional restriction.

Bassett v. Salisbury Manufacturing Co., 47 N. H. 426, was an application to a court of equity for an injunction to restrain the defendants from flowing the plaintiff's land by means of a dam. It

Eaton v. Boston, Concord & Montreal Railroad.

appeared that the company had kept up the water in their dam the entire year, under a claim of right, for about seven years, with the knowledge of the plaintiff and his grantors, and without objection on their part. It also appeared that during the same time the company had made expensive erections of mills and machinery to be operated by the power so gained. It was held that the acquiescence of the plaintiff and his grantors furnished good reason for refusing to exercise the summary power of granting an injunction. That decision is not in point here. The present proceeding is a suit at law. It is not an application to a court of equity to exercise the discretionary power of granting the extraordinary and summary remedy by injunction. Nor are the facts as to the plaintiff's acquiescence, or as to the defendants' change of position, shown to be similar to what was proved in *Bassett v. Salisbury Manuf. Co.*

There are decisions exempting municipal corporations from liability in civil actions for neglect to perform public duties. See *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Randolph*, 14 Gray, 541. There are also decisions exempting municipalities and some classes of public officers from liability for the manner of performing duties of a purely public or judicial nature. We do not propose to consider the intrinsic correctness of all the decisions which have proceeded upon these grounds (see DILLON, C. J., in *McCord v. High*, 24 Iowa, 336, 350), for the principles upon which they are founded do not apply to the present defendants. The damage here complained of results from an act of commission, not omission. The defendants do not stand in the position of public bodies constituted for the sole purpose of executing a public trust or duty, in the performance of which they have no other interest than that which every citizen has. "True, the public benefit may be so far promoted by works authorized to be made by such corporations, that the property of individuals taken by them by virtue of their charters may be deemed to be taken for public use, within the constitutional provision on that subject; still, they exercise their corporate privileges under a private grant of the legislature, conferring upon them specific powers for their own direct and private advantage." "They are trustees of public interests for their own benefit." DAVISON, J., in *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 Ind. 433, 435; ARCHER, C. J., in *Barron v. Mayor of Baltimore*, 2 Am. Jurist. 213. The defendants voluntarily accepted their charter with a view to their own private emolument, and do not occupy the posi-

Eaton v. Boston, Concord & Montreal Railroad.

tion of a municipality invested, without their consent, with powers to be exercised solely for the public benefit. If there can be any analogy between the liabilities of this railroad corporation and of a municipality, it is with reference to the liability of the latter for their manner of managing or dealing with property or rights held by them, "not for the direct and immediate use of the public," but for their own benefit in their corporate capacity. For injuries caused by the improper management or use of property thus held by them, municipal corporations "are liable to the same extent and in the same manner as private corporations and natural persons. Dillon on Municipal Corporations, § 780; PERLEY, C. J., in *Eastman v. Meredith*, 36 N. H. 284, 295, 296; GRAY, J., in *Oliver v. Worcester*, 102 Mass. 489, 500, 501; and see *Lowenthal v. Mayor of New York*, 61 Barb. 511; INGRAHAM, P. J., 520; Mr. Mitchell's note in 5 Am. Law Reg., N. S., 44 (explaining *Mills v. Brooklyn*, 32 N. Y. 489). We are not disposed to affirm the correctness of the decision in *Alexander v. Milwaukee*, 16 Wis. 247 (see the latter case of *Pettigrew v. Village of Evansville*, 25 id. 223); but even in that decision, somewhat reluctantly made in deference to the supposed current of authority relative to municipal corporations, the court did not go to the extent of holding that a private corporation would not have been liable under similar circumstances. See COLE, J., 255; PAINE, J., 257, 258. The cases which relate to the liability of municipalities for injuries caused in changing the grade of highways will be considered hereafter.

There are cases where an action against a corporation must fail, not because the defendants are a chartered body, but because the act complained of would not have been actionable if done by a private individual without legislative authority; the damage being remote, or being caused by "the reasonable use by another of his own property" (*damnum absque injuria*). "If my neighbor sets up a rival store or public house, he injures me, but I cannot sue him." So, if the public open a new road, "and thereby draw away custom from my hotel or my stage line, I have no remedy unless one is given by statute." See *Petition of Mt. Washington Road Co.*, 35 N. H. 134; *Fuller v. Edings*, 11 Rich. S. C. Law, 239; S. C., 12 id. 504; *Richmond & Lexington Turnpike Road Co. v. Rogers*, 1 Duval (Ky.), 135. "The removal of a county or State capital will often reduce very largely the value of all the property of the place from whence it was moved; but in neither case can the party

injured * * * claim compensation from the public." Cooley's Const. Lim. (1st ed.) 384. A railroad corporation, in erecting a fence upon their own land to prevent the snow from being blown upon their road, are merely making a proper and reasonable use of their own property; and, although such use may cause annoyance or damage to the adjacent land-owner, it gives him no cause of action. *Carson v. Western R. R.*, 8 Gray, 423; *Waffle v. N. Y. Central R. R. Co.*, 58 Barb. 413, appears to have been decided upon the same principle; see, also, *Henry v. Vt. Central R. R.*, 30 Vt. 638, REDFIELD, J., 641; and *Greeley v. Maine Central R. R.*, 53 Me. 200. "Unless the particular injury would have been actionable before the company had acquired their statutory power, it is not an injury for which compensation can be claimed." In cases where the defense of reasonable user is successfully maintained by corporations, "the defendants only ask that the same principle shall be applied to them as to individuals;" they "only ask the same protection that an individual has." See WILLIAMS, C. J., in *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124, 132, 133. In the case at bar the defendants ask something more. They claim that their statutory powers protect them from liability for the infliction of an injury, which would clearly have been actionable if done by a private person.

Hatch v. Vt. Central Railroad Co., 25 Vt. 49, may be noticed in this connection. It was there decided that the defendants were not liable for the action of their embankment in causing the water, "upon the occasion of showers and melting of the snow," to flow into the plaintiff's store, provided the railroad "was built in a manner to do the plaintiff no unnecessary damage." We incline to think that, by the law as held in Vermont, the act complained of would not have been actionable if done by a private individual upon his own land, adjacent to the plaintiff's lot. In that State no action is maintainable for obstructing or diverting water percolating through the soil — *Chatfield v. Wilson*, 28 Vt. 49; and it would not be unreasonable to infer that no action can be maintained there for so changing the level of the soil as to cause mere surface waters to pass into adjacent lots "in greater quantities or in other directions than they were accustomed to flow" (see Angell on Water-courses, 6th ed., § 108 a, et seq., citing authorities not in entire accord with the decisions of our own court in *Swett v. Cutts*, 50 N. H. 439, and *Bassett v. Salisbury Manufacturing Co.*, 43 id. 569). Besides the damage

Eaton v. Boston, Concord & Montreal Railroad.

caused by surface water, Hatch also claimed to recover on account of the obstruction to his business caused by the embankment in the street, and the running, etc., of trains thereon. The decision against him on that branch of the case is not in point here. So far as that part of Hatch's case was concerned, there was no physical interference with or encroachment upon his land. It did not appear that Hatch owned the fee in any part of the highway. When the case came up a second time (28 Vt. 142, 147) BENNETT, J., said: "The case, then, does not call upon us to decide what would have been the rights of Hatch, if any, in case it had been shown that he owned the fee in the land to the center of the highway." The physical consequences of the defendants' acts (apart from the matter of the surface water) did not extend beyond the limits of the highway, within which the plaintiffs had no proprietary interest. It would seem that the legislature had attempted to grant to the corporation the right of crossing the highway, upon the "condition subsequent" of restoring the highway to its former state of usefulness, as near as might be, to the satisfaction of the selectmen or commissioners. As against Hatch, the corporation would appear to have had the right to build their track across the highway. Whether even the owner of the fee in the highway could have sued *the town* for building such an embankment, is a question which will be referred to hereafter.

Richardson v. Vt. Central R. R. Co., 25 Vt. 465, is, upon the first point therein decided, an authority in favor of the present plaintiff. The second point decided in that case is similar to the point in *Hatch's case*, which was last discussed. The court expressly said, p. 472, that it did not appear that the fee in the soil of the highway belonged to the Richardsons, and that "the action was evidently not predicated or tried upon any such supposed state of facts." Whatever may be said as to some of the language of the court in these Vermont cases, the actual decisions on the points last named in each case are not necessarily in conflict with the result reached in the present case. Because an act which does not physically affect a lot of land is held not to be "taking of the owner's property," it does not follow that such a physical injury to land as the present plaintiff complains of is not a "taking." If it should be conceded that no mere personal inconvenience, annoyance or discomfort to a landowner can amount to a taking of property, and that the legislature may constitutionally authorize the

defendants to inflict such annoyances, these concessions do not dispose of the plaintiff's claim. He complains that the physical consequences of the defendants' acts extended beyond their land into his land; that his possession has been disturbed, his premises invaded and his soil covered with foreign substances. The legislature may authorize a railroad corporation to do some acts, which, but for such authority, would be punishable as nuisances. But it does not follow that the legislative power in this direction is unlimited. On the contrary, the legislature are powerless when they attempt to pass "the limits prescribed by the constitution," and one of those limits is reached whenever the proposed act amounts to a taking of private property without compensation.

We come now to a class of cases, many of which might well have been placed under some of the preceding heads. They are what, for want of a better name, may be called "the highway grade cases," viz.: unsuccessful actions against municipalities to recover damages alleged to have been sustained by adjacent landowners in consequence of the grading of highways, or the changing of the grade, or the making of other alterations or improvements in highways. If the decisions in some of these cases are necessarily inconsistent with the conclusions reached in this opinion, still there is a large proportion of the cases of which this is not true. We think that many of these cases have been correctly decided, but that the courts have not always put the decision upon the right ground. It is proposed to state briefly the grounds upon which we think that many of these cases might have been disposed of.

When land is taken in the first instance for a highway, the public pay for and acquire "complete control of the soil over which it passes, for all the purposes of its proper enjoyment and maintenance." Angell on Highways (2d ed.), § 202. "The rights of the public to the highway, for the legitimate purposes of travel and improving the road, are as perfect and absolute as the rights of a natural person are to his private property in lands" (dissenting opinion of BIRCHARD, J., in *McCombs v. Town Council of Akron*, 15 Ohio, 474, p. 481). If a private landowner lowers the grade of his own lot, and does not thereby cause his neighbor's soil (which has no artificial weight upon it) to break away, "and slide down of its own weight," no action will lie. So, if he raises the grade of his own lot, without placing or causing to be placed any foreign substance upon his neighbor's lot, his neighbor has no legal remedy

Eaton v. Boston, Concord & Montreal Railroad.

against him. His acts may render the occupation of the neighboring lot less convenient; but he has simply exercised his right to make a reasonable use of his own land, and his neighbor has a corresponding or correlative right to do acts of the same nature on *his* land. In like manner, when a town lower or raise the grade of a street, without thereby undermining, or invading, or causing foreign substances to be placed upon the soil of the adjacent owner, or in any way disturbing such owner's possession, they are only making a reasonable use of their proprietary rights. "No consequences flow from their acts that would have made a natural person liable had he been the owner and performed the same acts." BIRCHARD, J., *ubi supra*, p. 482. Without touching the adjacent owner's lot, or in any way encroaching upon it, the town "had as clear and perfect authority to raise its street higher or sink it lower than the level of his lot, as he would undoubtedly have had to elevate or sink his ground, without touching or otherwise injuring or interfering with the public street." ROBERTSON, C. J., in *Keasy v. Louisville*, 4 Dana, 154, p. 155. In such a case there is no encroaching upon the soil of the adjacent owners, "or invading their dominion." "Not a shovel full of earth was taken from it or thrown upon it. There stands their property, within its proper limits, as it stood before;" *per curiam*, in *Henry v. Pittsburgh, etc., Ct.*, 8 Watts & Serg. 85, p. 86. Towns are "not bound to grade and improve, or pay for grading and improving, the adjacent lots of private persons, so as to make them correspond with the street." SPOFFORD, J., in *Reynolds v. Shreveport*, 13 La. Ann. 426, p. 427. When, then, the acts of the town have been done within the limits of the highway, and do not produce any physical effect or change without those limits, neither taking any thing from the soil of the adjacent lots, or superimposing any thing upon that soil which was not there before, there is no question of constitutional law involved. The town have only made the same reasonable use of their property that every private owner may make of his property. "The rights of the public in property are to be governed by the same rules of law as the rights of individuals." HAILE, J., in *Rounds v. Mumford*, 2 R. L. 164, 162. If the soil of the highway was originally taken from the complaining adjacent owners, or from their grantors, they have already been compensated for the damage; for it must be presumed that the possibility of such future changes in the highway was taken into account in the original assessment of damages

Eaton v. Boston, Concord & Montreal Railroad.

upon the laying out. If, on the other hand, the highway was built over land taken from another proprietor, the town have done nothing more than that original proprietor might have done with impunity if he had still continued in the exclusive ownership of the land.

Among the cases where we think that the decision may well stand upon the ground of reasonable user of public property, and where, therefore, the result actually reached (*i. e.*, the exemption of the municipality from liability) is not inconsistent with the present decision, are the following: *Humes v. Mayor, etc., of Knoxville*, 1 Humph. (Tenn.) 403; *Rounds v. Mumford*, 2 R. I. 154; *Callender v. Marsh*, 1 Pick. 418; *Roberts v. Chicago*, 26 Ill. 249; *Macy v. Indianapolis*, 17 Ind. 267; *Creal v. Keokuk*, 4 G. Greene (Iowa), 47; *Reynolds v. Shreveport*, 13 La. Ann. 426; *Hoffman v. St. Louis*, 15 Mo. 651; *Benedict v. Goit*, 3 Barb. 459; *Simmons v. City of Camden*, 26 Ark. 276; *Keasy v. Louisville*, 4 Dana, 154. We are also inclined to enumerate, under the same head, *Henry v. Pittsburgh, etc., Co.*, 8 Watts & Serg. 85; *Reading v. Keppleman*, 61 Penn. St. 283; *Green v. Reading*, 9 Watts, 382; *Snyder v. Rockport*, 6 Ind. (Porter) 237; *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 148 (where the defendants justified under a city ordinance; see *COLE*, O. J., 156). See, also, in this connection, *EDWARDS, J.*, in *Waddell v. Mayor of New York*, 8 Barb. 95, 99; *Whittier v. Portl. & Ken. R. R.*, 38 Me. 26. We think it quite apparent that *Towle v. Eastern R. R.*, 17 N. H. 519 (see, also, 18 N. H. 547), may well be classed under this head. The defendants acted under the order of the town, and the act directed by the town was one for which a private owner would not have been held answerable. See, also, the remarks of *PARKER, O. J.*, 523, suggesting the further distinction that the act there complained of was not the voluntary act of the defendants, done for purposes of their own convenience and benefit.

The Massachusetts decisions, which exempt towns from liability for the flow of surface water from the highway on to premises adjacent to the highway (*Flagg v. Worcester*, 13 Gray, 601; *Turner v. Dartmouth*, 13 Allen, 291; see, also, *Dickinson v. Worcester*, 7 id. 19), give towns no greater rights or immunities in this respect than individual proprietors have in that State. See *Gannon v. Hargadon*, 10 Allen, 106; *Bates v. Smith*, 100 Mass. 181. "In this respect," said *MERRICK, J.*, 13 Gray, 603, "the rights of towns and

Eaton v. Boston, Concord & Montreal Railroad.

of the owners of land adjoining a highway are not dissimilar to those of coterminous proprietors of land." And, in *Franklin v. Fisk*, 13 Allen, 211, it was held, that while the public may raise the level of their traveled path and thus cause the surface water to flow upon the land of an adjacent owner, the adjacent owner may also raise his land to prevent this effect. See, also, *Bangor v. Lan- arid*, 51 Me. 521, 525; Angell on Water-courses (6th ed.), §§ 108, 1, 108, m. *Hoyt v. City of Hudson*, 27 Wis. 656, stands upon the same ground as the Massachusetts cases — the court holding that a private proprietor could have done what the city did, and that "cities, towns and villages, as the owners of lands for highways and other public purposes, have the same right to obstruct or repel the flow of surface water as other proprietors." DIXON, C. J., 660. See, in this connection, *Pettigrew v. Village of Evansville*, 25 Wis. 223, where the defendants' acts were held unjustifiable. In *Taylor v. St. Louis*, 14 Mo. 20, an alley had been dedicated to the public by the plaintiffs or their ancestors; and NAPTON, J., said the probability of its being graded, when the public interest required it, must have been calculated on when the buildings were erected.

We do not assert that *all* the "highway grade cases," where municipalities have been exempted from liability, could have been decided on the foregoing ground of reasonable user of public property. But a considerable proportion of the remaining cases of this class are very near the border line in this respect; and, without a fuller statement of facts, or a perfect knowledge of the law in each jurisdiction relative to the construction given to the right of reasonable user on the part of individual proprietors (particularly in reference to surface water), it is difficult to determine on which side of the line some of the cases belong. We do not feel certain that the following cases could not have been decided on the above ground of reasonable user. *O'Connor v. Pittsburgh*, 18 Penn. St. 187; *Rome v. Omberg*, 28 Ga. 46 (see LUMPKIN, J., 47, 49); *Roll v. Augusta*, 34 id. 326; *St. Louis v. Gurno*, 12 Mo. 414; *White v. Corporation of Yazoo City*, 27 Miss. 357; *Clark v. City of Wilmington*, 5 Harr. (Del.) 243, 244; *Wilson v. Mayor of New York*, 1 Denio, 595; see, also, *Carr v. Northern Liberties*, 35 Penn. St. 324; Angell on Water-courses (6th ed.), §§ 108, 1, 108, m. In the oft-quoted case of *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N. Y. 195, some of the views of BRONSON, J., are in direct conflict with the present decision (see 4 N. Y. 197, 198, 203-208);

but no less than five pages of the opinion are occupied in attempting to establish the position that the corporation of Brooklyn had done nothing more than a private owner might lawfully have done in the exercise of the same proprietary rights. If this last position does not accord with the current of authority, still the fact that it was the opinion entertained by BRONSON, J., in that case, may have induced a less careful consideration by that eminent judge of the other grounds of the decision, which were wholly unnecessary if the above position was well taken.

The case of *Benden v. Nashua*, 17 N. H. 477, was decided in 1845, but the volume of reports in which it is contained was not published until 1864. In 1855, SAWYER, J., in delivering the opinion in *Ball v. Winchester*, 32 N. H. 435, 441, undertook to state the questions which had been raised and decided in *Benden v. Nashua*. As SAWYER, J., was, in 1845, a member of the bar, residing in Nashua (or Nashville), it is quite probable that he heard the court announce the decision in *Benden v. Nashua* and we think that his recollection, ten years afterward, of the grounds of the decision as then stated by the court, may have been as accurate as the recollection of PARKER, C. J., after nearly double that space of time. In *Ball v. Winchester*, SAWYER, J., says, pp. 441, 442, that the injuries complained of in *Benden v. Nashua*, were occasioned "by causing the rain water to flow into the house, and also by creating an embankment immediately in front of it;" and that, "in the reasoning of the court upon the case, the decision was placed upon the ground that the town could not be held answerable for the acts of the surveyor; and, also, upon the ground that for such consequential damages as might result to the owner of the adjoining land from the improvements which the public accommodation required to be made in the highways, the compensation must be presumed to have been made in the award of damages for the land taken for the highway." If the foregoing is a correct statement of the grounds of that decision, they are not necessarily inconsistent with the present conclusion.

If, on the other hand, the reported opinion in 17 N. H. correctly indicates the views then taken by the court, it nevertheless admits of question whether the case could not have been decided upon the ground of reasonable user. As the law is now settled by the decision in *Swett v. Cutts*, 50 N. H. 439, the question of reasonable user as to the flow of surface-water might be for the jury. *Ball v. Win-*

Eaton v. Boston, Concord & Montreal Railroad.

Chester, 32 N. H. 435, is not in point. In that case, the court held that the acts of the surveyor were not the acts of the town, and that the town were not liable to the plaintiff for neglect to perform the duty of keeping the highway in repair.

Without reviewing all the cases on this topic (see *Smith v. Washington*, 20 How. 135; *Lafayette v. Spencer*, 14 Ind. 399; *Vincennes v. Richards*, 23 id. 381; *Plumb v. Morris Canal & Banking Co.*, 2 Stockton's Ch. [N. J.] 256; and other cases collected in Dillon on Municipal Corporations, § 783, note 1), it is quite clear to our minds that *the judgments rendered* in a very considerable proportion of them are not necessarily irreconcilable with our conclusions in the case at bar.

So far as the decisions in any of these "highway grade cases" are absolutely inconsistent with the present opinion, we are not disposed to acquiesce in them, nor to decide this case upon their authority. That authority has been somewhat weakened by the dissatisfaction expressed by some judges at the harshness and injustice of the decisions which they have felt compelled to make (see *O'Connor v. Pittsburgh*, 18 Penn. St. 187; WOODWARD, J., in *In re Ridge St.*, 29 id. 391, 395; KINNEY, J., in 4 G. Greene [Iowa], 47, 52); also, by the fact that the manifest hardship thus engendered has led, in more than one instance, to legislative enactments for the protection of adjacent landowners. See, in our own State, the statute of 1848, chap. 725, probably passed in consequence of the decision in *Benden v. Nashua*, *ubi supra*.

If these decisions were intrinsically correct, it might be desirable to consider further the question already adverted to, whether the position of these defendants is analogous to that of municipal corporation. But we think that decisions, which go to the length of exempting municipalities from liability for the infliction of injuries like the present, are erroneous in principle. If, in the repair of highways, there is a physical interference with land outside the limits of the highway, a substantial taking away of the soil of the adjacent owner, or an imposition of foreign substances upon it so as to amount to a substantial abridgment of his right of exclusive user, the mere fact that the injury is done by a town or city ought not to deprive the landowner of all redress. The opposite view "places individual property * * * at the mercy of municipal power." "We can solve more easily and safely questions of this character, if we take pains to free our minds from the false notion that a muni-

ality has some indefinable element of sovereign power, which takes from the property of the citizen, as against its aggressions, the protection enjoyed against the aggressions of a natural person." The same constitutional provision that protects the right of private property against invasion by private individuals, must protect it from similar aggression on the part of municipal corporations." LAWRENCE, J., in *Nevins v. City of Peoria*, 41 Ill. 502, 508-510. "It is said that the city must grade streets and direct the flow of waters as best it can for the interests of the public. Undoubtedly; but if the public interest requires that the lot of an individual shall be rendered unfit for occupancy, either wholly or in part," by placing something on the soil, or by taking from the soil, "in this process of grading or drainage, why should not the public pay for it, to the extent to which it" thus "deprives the owner of its legitimate use. Why does not the constitutional provision apply as well to secure the payment for property partially taken for the use or convenience of a street, as when wholly taken and converted into a street? Surely the question of the degree to which the property is taken can make no difference in the application of the principle. To the extent to which the owner is" thus substantially "deprived of its legitimate use, * * * to that extent he should be paid." LAWRENCE, J., *ubi supra*, p. 511.

The intrinsic correctness of the views just expressed is strongly maintained by the reasoning of Mr. Angell in his works on Highways (2d ed.), § 211. It is also supported, in some degree, by the last paragraph in section 790 of Dillon on Municipal Corporations, and by the decisions in *Pettigrew v. Village of Evansville*, 25 Wis. 223. See, also (besides *Nevins v. Peoria*, *ubi supra*), *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.), 416; *McCord v. High*, 24 Iowa, 336, BECK, J., p. 342, DILLON, C. J., p. 350; dissenting opinion of BIRCH, J., in *St. Louis v. Gurno*, 12 Mo. 414, 424. (There are also cases in Ohio, cited in Dillon on Municipal Corporations, § 783, note 1, some of which would seem to impose a greater degree of liability on municipal corporations than it is necessary for the plaintiff in this case to contend for as against a railroad corporation. See, also, 2 Kent's Com. 414, note b.)

No one can read these "highway grade cases" without perceiving how much American courts have relied upon the English authorities as establishing the position that the formal enactment of a statute purporting to authorize the doing of an act always affords a

Eaton v. Boston, Concord & Montreal Railroad.

complete justification to the doer. The fallacy of assuming that our State legislatures possess the practically omnipotent powers of the British parliament; or that they pass none but constitutional statutes, has already been exposed. It is, however, worth remark, that the English case most frequently cited in these American decisions (*Gov. & Co. of the British Cast Plate Manufacturers v. Meredith*, 4 Term, 794) was one which, it seems to us, might well have been decided on the ground that the paving commissioners had simply made the same reasonable use of public property that an individual might lawfully have made of his private property; that they had done nothing more in the street than a private individual might do with impunity upon his own land.

By the foregoing review of authorities, it appears that the number of actual decisions in irreconcilable conflict with the present opinion is much smaller than has sometimes been supposed, and that, in a large proportion of the cases cited, the application of the principles here maintained would not have necessitated the rendition of a different judgment from that which the courts actually rendered in those cases.

Thus far Eaton's case alone has been under consideration. The only difference between Eaton's case and Aiken's case arises from the fact that a small part of the ridge is included in Aiken's farm, while none of it is on the farm of Eaton. This difference does not affect the present inquiry, which relates solely to the correctness of the ruling at the trial. The court did not rule that Aiken could recover the damages occasioned to him by the entire cut through the ridge. The ruling was carefully limited to "such damages as have been caused" the plaintiffs "in consequence of the defendants' cutting away the ridge north of the plaintiffs' farms." If any damage was caused to Aiken by the defendants' removing any portion of that "small part" of the ridge which was included in his farm, he is not entitled to recover for it under this ruling. So far, then, as the correctness of the ruling is concerned, Aiken's case stands on the same legal principle as Eaton's. Under this ruling it will be for a jury to say how much of the injury to Aiken's meadow was occasioned by the removal of that part of the ridge which was north of Aiken's farm.

In both cases the exception is overruled. As the defendants elect trial by jury, the order must be,

Case discharged.

FARLEY V. LINCOLN.

(51 N. H. 577.)

Sale — assignment — replevin.

Goods were bought by means of fraud under such circumstances as entitle the vendor to treat the whole transaction as void, and the vendee, upon getting possession, immediately transferred them, by general assignment of all his property, to an assignee. *Held*, that the vendor could maintain replevin against the assignee.

ACTION of replevin by Farley, Amaden & Co., against John G. Lincoln to recover certain goods and merchandise in his possession.

Plaintiffs are wholesale merchants in Boston. The goods in suit were bought of them by A. B. Sanborn, of Suncook, N. H., April 18, 1870, on thirty days' credit. Plaintiffs claim that the transaction was fraudulent, and made with intent to cheat and defraud them, and under such a state of affairs as entitled them to treat it as wholly void, and reclaim the goods. After Sanborn received the goods, and on April 27, 1870, he made a general assignment of all his property to defendant, under chapter 126 of the General Statutes of New Hampshire, who immediately took possession of same and the goods in question with it. May 3, 1870, before bringing suit, plaintiffs duly demanded the goods of defendant, and said Sanborn, both of whom refused to give them up.

Tappan & Mugridge, for plaintiffs.

Marshall & Chase, for defendant.

LADD, J. Supposing the facts to be as claimed by the plaintiffs, we think they might maintain trespass or replevin against Sanborn for the goods, notwithstanding he came to the possession of them in the first place by means of a fraudulent sale. And this stands well enough, upon the ground that there never was any real contract of sale between the parties by which the plaintiffs were bound. Sanborn acquired no rights in the property by the form of a sale which was gone through with, and hence his first, as well as every subsequent act of dominion over it, amounted to a trespass, if the defendant elected so to treat it.

Farley v. Lincoln.

No serious question is made by the defendant's counsel, but this would be so; and it is admitted further, that, upon a demand and refusal, the plaintiffs might maintain trover or detinue for the goods against this defendant. But it is insisted that, inasmuch as it does not appear that the defendant was a party to Sanborn's fraud, or had knowledge of it, his taking by assignment from Sanborn cannot be regarded as wrongful, although Sanborn had no title, and therefore that the present action will not lie against him. This is the important question in the case, and if it were to be decided upon authority alone, it would undoubtedly present considerable difficulties. See *Barrett v. Warren*, 3 Hill, 350, and *Stanley v. Gaylord*, 1 Cush. 536. In these two cases, the authorities on both sides of the question are collected, and the whole subject very ably discussed. The New York court came out one way, holding that trespass would not lie against a person who comes to the possession of goods by delivery, and without fault on his part, *a. g.*, an innocent bailee of the wrong-doer, COWEN, J., dissenting; while the Massachusetts court held exactly the contrary, WILDE, J., dissenting.

To maintain trespass or replevin, there must be a wrongful taking; and the question is, whether the taking by the defendant here was wrongful, in a legal sense, as against the plaintiff. At the time of the assignment the plaintiffs were the absolute general owners, and were entitled to the immediate possession of the goods. The assignment passed no title, and conferred no right upon the defendant in respect of the goods as against the plaintiffs, for the obvious reason that Sanborn had no right or title in them as against the plaintiffs which he could confer upon anybody. This being so, the first act of possession exercised by the defendant over them was inconsistent with and in derogation of the plaintiffs' right. Absolute ownership draws possession after it. If, then, the defendant's act in taking the possession was an interference with the plaintiffs' right of actual possession growing out of their ownership, it was in legal effect a disturbance of their constructive possession.

The defendant's act in assuming dominion over the property was none the less an invasion of the plaintiffs' right, and none the less a trespass, because he did not intend a wrong, or know that he was committing one. An encroachment upon a legal right must constitute a legal wrong; and it is familiar law, that intention is of no account in a civil action brought by one man to recover damage

for a wrongful interference with his property by another. The law gives the plaintiff compensation for the injury he has sustained, whether the defendant intended such injury or not. Indeed, a large proportion of trespasses, especially to land, are doubtless committed through inadvertence or mistake, without wrongful intent, and without knowledge on the part of the wrong-doer that he has overstepped his right.

How does this case differ in principle from that of a person who, under a mistake as to the location of the boundaries of his land, incloses a piece of adjoining land of which the real owner has never had actual possession, and cultivates it in the mistaken belief that it is his own? One act is undoubtedly as free from the taint of moral wrong as the other. In both alike there is only a disturbance of a possession purely constructive. The only distinction is, that in one case the subject is land, while in the other it is a chattel; and I do not see that this makes any more difference than if the property interfered with were in one case a cow, while in the other it was a horse.

In *Stanley v. Gaylord*, before cited, the case of *Hyde v. Noble*, 13 N. H. 494, is quoted as an authority fully sustaining the doctrine there laid down. *Hyde v. Noble* was trover by the owner of a cargo of lumber against Noble and another, who had bought and taken the delivery of a portion of it from the plaintiff's bailee while transporting it under a contract from Hallowell and Gardiner, in Maine, to Weymouth, in Massachusetts. In delivering the opinion of the court, PARKER, C. J., says: "The purchase by the defendants, taking possession as they appear to have done, and holding it as their own property, was a conversion. They received the possession from one who had no authority to deliver it to them, under a sale which purported to vest the property in them; and they, by the purchase, undertook to control it as their own property. This was an assumption of power over it, inconsistent with the rights of the plaintiff. Purchasing the property from one who had no right to sell, and holding it to their own use, is a direct act of conversion, without any demand and refusal; their possession was unlawful in its inception, by reason of the want of authority in Kenniston to make the transfer. It is only where a party obtains the possession lawfully, that it is necessary to show a demand and refusal." The same thing in substance has been said in several other cases in this State

Doty v. Hawkins, 6 N. H. 247; *Lovejoy v. Jones*, 30 id. 169; *Cooper v. Newman*, 45 id. 339, and authorities cited.

The facts stated in *Hyde v. Noble* show that there was a demand and refusal before the commencement of the suit; but that case has been constantly referred to, as well in this State as in other jurisdictions, to the point broadly laid down in the opinion of PARKER, C. J., that trover without a demand lies in favor of the owner of a chattel against one who has come to the possession of it by purchase from one having no right to sell; and it would doubtless be a surprise to the profession to learn that such is not the law here. We think it is the law, and that it rests upon reasons quite satisfactory and sound. *Parsons v. Webb*, 8 Greenl. 38; *Galvin v. Bacon*, 2 Fairf. 30; *Stanley v. Gaylord*, 1 Cush. 536; and see the able and instructive dissenting opinion of COWEN, J., in *Barrett v. Warren*, 3 Hill, 351. But it is very obvious that there was no conversion in the case of *Hyde v. Noble*, unless the original taking was a conversion; and that taking was not a conversion unless it was wrongful. If, therefore, it was not wrongful, a demand and refusal would have been necessary before trover could be maintained. But "whenever the taking of goods is wrongful, trespass, replevin, and trover without a demand are concurrent remedies for the owner, if he has the right of immediate possession." METCALF, J., in *Stanley v. Gaylord*, at 545, citing *Wilkinson on Replevin* 2; 7 Johns. 143; 1 Chit. Pl. 176; 2 Saund. 47, & note. That being so, the doctrine of *Hyde v. Noble* is decisive of the present case; for, according to that case, trover without a demand would lie here, and therefore the plaintiffs might bring either of the concurrent remedies, trespass or replevin, at their election.

It is undoubtedly settled that, inasmuch as a fraudulent sale is voidable only, the vendor cannot set it aside to the injury of third persons who have made expenditures under it, on the supposition that it is binding. And so a purchaser for value, without notice from the fraudulent vendee, will acquire a good title. *Grout v. Hill*, 4 Gray, 369; *Trull v. Bigelow*, 16 Mass. 406; *Buffington v. Gerrish*, 15 id. 156; *White v. Garden*, 10 C. B. 919; *Root v. French*, 13 Wend. 570; *Mowrey v. Walsh*, 8 Cow. 238. But no such question arises here. The defendant was not a purchaser, and had made no expenditures under the fraudulent sale. At the utmost, his rights in respect to the property could not be larger than those of an

Wright v. Holbrook.

attaching or judgment creditor. And the cases all are, that such creditor acquires no title that will hold against the true owner, the vendor. *Load v. Green*, 15 M. & W. 216; *Bristol v. Wilmore*, 1 B. & C. 514; *Van Cleef v. Fleet*, 15 Johns. 147; *Mowrey v. Walsh*, 8 Cow. 288; *Root v. French*, 13 Wend. 575; *Buffington v. Gerrish*, 15 Mass. 156. "An assignee takes the thing assigned, subject to all the equity to which the original party was subject." *Ld. Mansfield*, in *Peacock v. Rhodes*, Dougl. 636.

We have not thought it necessary to go into a minute and extended discussion of the question raised in this case. The authorities to which reference has been made furnish an ample and exhaustive review of the whole subject, and all the authorities. From a careful examination, we are brought to the conclusion that the taking by the defendant was in the eye of the law wrongful, and a disturbance of the plaintiffs' constructive possession; and, therefore, that, upon the facts claimed, the action may be maintained.

Case discharged.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

CLARK v. WELLS.

(45 Vt. 4.)

Conditional sale — property by accession.

B. sold a wagon to H. on condition that it should remain the property of B. till paid for. Plaintiff repaired it for H. by putting in new wheels and axles. H. took it from plaintiff's possession without his knowledge or consent, and afterward agreed with plaintiff that the "running part" of said wagon should remain the property of plaintiff until paid for. H. never paid either B. or plaintiff, and neither had notice of the other's claim. B. took the wagon back from H. and sold it to defendant, who did not know of plaintiff's claim. *Held*, that defendant was liable in trover for the wheels and axles.

TROVER by John W. Clark against J. B. Wells for the wheels and axles of a stage-wagon.

The opinion states the case. The court below rendered judgment. Verdict for the plaintiff for the value of the wheels and axles, to which the defendant excepted.

C. H. Heath, for defendant. This is not a case of confusion of goods. 1 Hill. on Torts, 550; *Haseltine v. Stockwell*, 30 Me. 237; *Bryant v. Ware*, id. 295. Harrington had no right to destroy the old wagon, nor any part of it; nor could he give that right to another. *Hiscox v. Greenwood*, 4 Esp. 174.

Heaton & Reed, for plaintiff.

REDFIELD, J. This action is trover for the alleged conversion of the wheels and axles of a wagon.

The case shows that a stage-wagon was sold by Bridgman to Harrington, with the condition that said wagon was to remain the property of said Bridgman until the price was paid; and that the purchase-money was never paid. That afterward, at the instance of Harrington, plaintiff repaired said wagon by substituting new wheels and axles for the old.

That Harrington took the wagon, thus repaired, from plaintiff's shop, without his knowledge or consent. Afterward, Harrington gave his note to the plaintiff for such repairs, with the condition and agreement that the running part of said wagon should remain the property of the plaintiff until said note was paid. Bridgman thereafter took possession of the wagon, with the new gear added by plaintiff, and sold it to the defendant, without knowledge of plaintiff's claim.

The defendant is a *bona fide* purchaser without notice of any right or equity on the part of the plaintiff. The plaintiff's lien for repairs upon the wagon was personal, and was waived by allowing the wagon to go back into Harrington's possession, and taking his note for the repairs, and security upon the parts of the wagon supplied by himself. He must, therefore, stand upon the *contract* between himself and Harrington.

We think the ordinary repairs upon a personal chattel, such as making new bolts, nuts, thills, and the like, become accretions to, and merge in, the principal thing, and become the property of the general owner. But in *this case* the wheels and axles constitute the *running part* of the wagon. They could be followed, identified, severed, without detriment to the wagon, and appropriated to other use without loss. The plaintiff was the owner, and never parted with the property. He had the right to resume possession when Harrington failed to pay the note. The property remained in him as perfectly as if, in the exigency of a broken wheel, or axle, he had loaned them for temporary use. Without questioning the main position of defendant's counsel, we think, under the facts stated in this case, the property in those wheels and axle continued in the plaintiff, and that an action lies for the conversion.

Judgment affirmed.

Smith v. Hill.

SMITH V. HILL.

(45 Vt. 89.)

Partnership—partners as to third persons.

One Harrington gave the plaintiff a note signed "Hill & Co. by Harrington." There never existed any such firm as "Hill & Co.," nor were Hill and Harrington ever partners; but sometime before the note was given, Hill was informed that Harrington was using his name, and he thereupon told Harrington that he "must not use that name to injure him," and Harrington said he would not. Hill did not know of the giving of the note to plaintiff, nor did plaintiff know of the previous use by Harrington of Hill's name. *Held*, that Hill was liable on the note.

ASSUMPSIT upon a promissory note, signed "L. D. Hill & Co., by F. C. Harrington." Plea, the general issues. The note was given to plaintiff by Harrington for some property purchased by the latter. There was no such firm as L. D. Hill & Co., nor were Hill and Harrington ever partners. Some two or three years before the note was given, Hill was informed that Harrington was using his name, and thereupon told him that he must not use that name to injure him. Harrington said he would not. Hill did not know of the giving of said note till about the time this suit was commenced, nor had he been ever before called upon to pay any thing on paper thus signed. It did not appear that plaintiff was aware of the previous use by Harrington of Hill's name, nor that Harrington made any representations when the note was given. Judgment was rendered for the defendant Hill, but against defendant Harrington. Plaintiff excepted to the rendering of the judgment for Hill.

C. H. Davis, for plaintiff, cited *Cottrill v. Vanduzen*, 22 Vt. 511; *Stearns v. Haven*, 14 id. 540; *Kellogg v. Griswold*, 12 id. 291; *Bailey v. Clark*, 6 Pick. 372.

Belden & May, for defendant, cited *Carter v. Whalley*, 1 Barn. & Ad. 11; *Parsons' Part.* (marginal) 119, 124, 130; *Hicks v. Cram*, 17 Vt. 449; *Young v. Axtell*, 2 H. Bl. 242; *Wood v. Pennell*, 51 Me. 52; *Mathews v. Felch*, 25 Vt. 536; 3 Kent's Com. 33.

PROX, J. If one suffers another to hold him out as a partner, or to use his name in business as such, he is liable as a partner on a contract thus made, although in fact he has no interest in the business of such partnership. When the defendant Hill was informed that Harrington, in his staging business, was using his name, under the name of L. D. Hill & Co., it does not appear that he forbid it, but that he afterward saw Harrington and told him he must not use that name to hurt him, and that Harrington replied that he would not. The fair import of this is, that Hill acquiesced in such use of his name, on Harrington's assurance that he would not thereby injure him, or, in other words, that he would not thus use his name beyond his ability to indemnify him, and that he would save him harmless. The risk of Harrington's neglect to redeem this pledge was upon Hill, and not upon those to whom Harrington should, in his staging business, thus pledge the credit of Hill. It makes no difference that Hill knew nothing of the giving of the note in question till about the time of the commencement of the suit. It is urged by the defendant's counsel, apparently with great confidence, that as it did not appear that the plaintiff ever knew of the previous use of the defendant Hill's name by Harrington in his staging business, nor what representations, if any, Harrington made to Smith, the plaintiff, at the time he executed the note by the name of L. D. Hill & Co., the defendant Hill cannot be held liable. This would be immaterial, if the signature did not disclose the name of Hill; as it might then be urged that the plaintiff did not take the note relying on the credit of Hill. But as the name of the defendant Hill appears specifically upon the face of the note as one of the makers, the case is quite different, since the legal intendment is, that the payee takes a note upon the faith of the persons whose names appear on it as makers. The common practice of this court is, in cases tried by the court when the facts are found by the county court, if the judgment of the county court is reversed, to proceed and render final judgment, such as the facts warrant; but in this case we conclude to reverse the judgment, and grant a new trial.

Judgment reversed and new trial granted.

PALMER V. PRESTON.

(45 Vt. 254.)

Bankruptcy — debt "created by fraud."

The indorser of a bill who was induced to indorse it by the fraudulent representations of the drawer, was compelled to pay it, and recovered judgment against the drawer for the amount so paid. In an action on the judgment defendant pleaded his discharge in bankruptcy. *Held*, that the debt sued on was not "created by fraud" within the meaning of the bankrupt act, and therefore that the plea was good.

ACTION of defendant by E. F. Palmer, executor of Luther Henry, against Richard Preston on a judgment recovered by the testator in his life-time. Plea, a discharge in bankruptcy. Reply, that on the 28th of January, 1865, defendant procured the plaintiff's testator, by means of false and fraudulent representations to indorse a draft for \$1,200; that the testator was afterward compelled to pay said draft, and that the judgment sued on was based upon the said sum of \$1,200 so paid. The defendant rejoined that the suit in which said judgment was recovered was assumpsit and was not for any other or different cause of action. Plaintiff demurred to the rejoinder, which demurrer was sustained, and judgment rendered for the plaintiff, to which defendant excepted.

Clough & Palmer, for plaintiff.

Randall & Durant and *T. J. Deavitt*, for defendant.

ROSS, J. It is conceded by the pleadings that the judgment which is in suit was obtained upon the defendant's contract as the drawer of the draft which the plaintiff's testator indorsed at the defendant's request, and afterward was obliged to pay. It is also conceded by the pleadings that the indorsement by the testator was procured by the fraudulent representations of the defendant, but that this fraud was not the foundation of the judgment now in suit. The question presented is, whether this fraud on the part of the defendant can be set up and become operative to defeat the bar which the defendant's discharge in bankruptcy would otherwise be

to the prosecution of this suit. The thirty-third section of the bankrupt act provides, among other things, that "a debt created by fraud" shall not be discharged by the operation of the bankrupt law. The vital question in the case is, whether the debt sought to be collected in this suit was "created by fraud." If so, the defendant's discharge in bankruptcy is no bar to the enforcement of its payment by the court. If the record of the judgment in suit is examined, it will be found that the debt evidenced by the judgment was created by the contract which the defendant entered into when he, as drawer, obtained the indorsement of the testator upon the draft, that if the testator should be compelled to pay the draft to the drawee, or his assignee, he, the drawer, would pay it to the testator. There is nothing in the record of the judgment sought to be enforced by this suit, that furnishes the slightest intimation that the transaction by which the debt was created, was tainted with fraud. The plaintiff's testator has elected to treat it as a debt created by contract, and so far as the judgment in suit is concerned, has waived all fraud. In an unreported decision in this county, *Charles M. Reed v. James M. Currier*, special term, 1851, and another case against the same defendant, it was held by this court that a party, having the right to enforce the collection of a debt, either by action on a contract, or by an action on the case for fraud, who has pursued his remedy by action on the contract to judgment, cannot afterward pursue it by action on the case for fraud. This is in accordance with the decisions of courts of other States. It is also well settled that the judgment in suit is, as against the defendant, for the enforcement of a debt created by contract. The defendant would not now be allowed to impeach that judgment by showing that no such contract, as the record of the judgment discloses, existed between the testator and himself, or that the indebtedness evidenced by the judgment was created by fraud and not by contract. The judgment, being conclusive upon the defendant as to the manner in which the indebtedness evidenced by the judgment was created, ought to be equally conclusive upon the plaintiff's testator in the same particular. We think the judgment in suit must be equally conclusive and binding upon both parties to it, in regard to the manner in which the indebtedness was created, unless the judgment itself was procured by the fraud of one of the parties. These views are not in conflict with the decisions of the United States courts in regard to this section of the bankrupt act. *In re*

Palmer v. Preston.

Whitehouse, 4 Bankr. Reg. 15, on the petition of the bankrupt to be discharged from arrest on an execution issued by the State court on a judgment, in which the record showed the cause of action to have been deceit, LOWELL, J., with the concurrence of SEEPLEY, J., held that the judgment of the State court did not so far merge the cause that the court could not look into the record and see that the cause of action was deceit, and says: "We are of the opinion, however that the record of the action, whichever way the execution issues, may be looked at, and if it shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. I do not intend to express any opinion upon the question whether a judgment in an action of contract, in which an allegation of fraud, if made, would be immaterial, might not be such a merger, or waiver, as is contended for. It might be very difficult to admit evidence to vary or contradict the record in favor of the creditor, when the debtor would be concluded on his side. Nor do I even mean to say that a suit on this judgment might not remove the fraud beyond the view of the court." The judgment of the State court under review was evidently recovered under the practice prevailing in some of the States, which allows the plaintiff to join several distinct causes of action, arising *ex contractu*, and tortwise, in the same bill of complaint, and permits him to take an execution either against the defendant's body, or against his property, if he prevails on that portion of the complaint sounding in tort. Hence the remark of Judge LOWELL, "The record of the action, whichever way the execution issues, may be looked at, and if it shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be one founded in fraud."

In re Ward E. Robinson, 2 Bankr. Reg. 108; S. C., 6 Blatch. 253, on an appeal from the district court to the circuit court by the bankrupt, because the district court refused to discharge him from arrest and bail, and refused to hear evidence to show that the debt was not created by fraud, where the record showed the debt, which had gone into judgment in the court of common pleas, and which was being enforced by the arrest of the bankrupt, originated in fraud, Judge NELSON says: "The court below held that the proceedings and judgment in the common pleas, the record of which was produced before it according to the practice and course of proceed

Seguin v. Peterson.

ings in that court under the New York law, carried on the face of them that the suit was one to recover a debt created by the fraud of the debtor; and that it would not go behind that record, to call in question its verity in the bankrupt court. We concur in this view." If the record, where it shows the indebtedness sought to be enforced was created by fraud, is to be held conclusive of that fact upon the defendant in the record, it must be equally conclusive upon the plaintiff in that record. If the fact that the debt was created by fraud is *res adjudicata* as to one of the parties to the judgment, it must be as to the other. Nor is the rule or law different where the record of the judgment shows that the debt sought to be enforced was created by contract. The defendant in the judgment cannot go behind the judgment, to call in question its verity, neither can the plaintiff. The matter is *res adjudicata* as to both parties to the judgment. This being so, the plaintiff, executor in this action, cannot be allowed to plead, or show, that the debt sought to be collected was created by fraud, when the record of the judgment in suit, and which was recovered by the testator in his life-time against this defendant, shows, that this very indebtedness was created by contract, and, for that reason, discharged by the defendant's discharge in bankruptcy.

Judgment of the county court is reversed, and judgment that the defendant's rejoinder is sufficient.

SEGUIN V. PETERSON.

(45 Vt. 255.)

Parent and child — recovery by parent of money paid by infant.

Plaintiff's infant son bought of the defendant cigar-holders and tobacco-pipes and paid for them. Afterward, plaintiff's wife — the mother of the child — went with the boy to defendant, tendered back the article, and demanded the money paid for them, which was refused. *Held*, that plaintiff could recover the money, and that demand by plaintiff's wife was sufficient.

ASSUMPSIT for money had and received, brought by Louis Seguin against George M. Peterson. Plea, the general issue. The court below found the following facts:

Seguin v. Peterson

The plaintiff's minor son, eleven years of age, living with his father and supported by him, without authority from his father, or any one, some time before trial, purchased of the defendant, who kept a grocery store, and sold groceries, pipes, tobacco, etc., a cigar-holder, for which he paid to the defendant \$1.25, and on the same day he purchased another cigar-holder and a pipe in a case, for which he paid the defendant \$2.50. Just before this, he purchased another pipe of the defendant, for which he paid \$1. He also purchased some candy of the defendant, but just how much he paid for it did not appear. The whole amount paid by the boy to the defendant, for cigar-holders and pipes, was \$4.75. The two first purchases were made of the defendant's clerk, who testified that when the boy bought the first cigar-holder, he asked him where he got the money to buy such things, and he said that he worked for Shepherd, Davis & Co., in the lumber yard, and earned it. The defendant himself sold the boy the pipe for a dollar, and he asked the boy where he got the money, and the boy told him substantially as he did the clerk. The defendant and his clerk both testified that they never saw the boy before to their knowledge, and did not know his name at the time, nor that he was the plaintiff's son. It did not appear that the plaintiff, or any of his family, had ever made any other purchases at the defendant's store. The court found that the articles so purchased were not necessities. The next day, or soon after said purchases, the plaintiff's wife, the boy's mother, went to the defendant's store with the boy, and carried back said articles, and demanded of the defendant the money paid for them, but the defendant refused to pay her the money, claiming that the articles had all been used and damaged, and were not worth more than \$4, which amount he offered to pay back. The articles were left in the defendant's store without his consent, and were there at the time of the trial.

Judgment was rendered for the plaintiff, and defendant excepted.

H. H. Talcott, for plaintiff.

Start & Watson, for defendant, cited *Ohit. Cont.* 673, 680, and cases cited; *Burnap v. Partridge*, 3 Vt. 144; *Babcock v. Granville*, 44 Id. 331; *Burnham v. Holt*, 14 N. H. 367; *Mason v. Waite*, 17 Mass. 560; *Lang v. Smyth*, 7 Bing. 284; *Burnham v. Fisher*, 25 Vt. 514; *Miller v. Race*, 1 Burr. 452; *Person v. Chase*, 37 Vt. 647;

Oliver v. Houdlet, 18 Mass. 237; *Robbins v. Fennell et al.*, 11 Q. B. 248.

REDFIELD, J. The plaintiff's minor son, a child of eleven years of age, purchased of the defendant cigar-holders and fancy pipes, in cases, and paid him therefor, in money, \$4.75.

The next day after said purchase, the plaintiff's wife, and child's mother, went with the boy to the defendant's store, tendered back the articles so purchased and demanded the money paid for them, which the defendant refused. The plaintiff thereupon brought this suit to recover the money thus paid for the smoking equipment furnished his child.

I. The court below adjudged, as a matter of law, that the money paid for this smoking outfit belonged to the plaintiff. There is nothing in the case to indicate that it belonged to any other person. The declaration of the boy that he "worked for Shepard, Davis & Co., and earned it," is no proof of that fact; besides, if it were so, it would not tend to show that money was not the property of the plaintiff. As the father is bound to provide for the maintenance of his infant children, so he is entitled to their earnings and the custody of their persons. *Benson v. Remington*, 2 Mass. 113.

There is no claim that the plaintiff had allowed the son to control his own wages, or contract for himself, as in *Varney v. Young*, 11 Vt. 258; *Tillotson v. McCrillis*, id. 477; *Chilson v. Philips*, 1 id. 41. The money, then, belonged to the plaintiff, and the defendant held it without right, against the will of the plaintiff and to his use.

II. The defendant claims that there was no proper demand for the money. Conceding that the contract of purchase was voidable, and that the plaintiff would be required to return the articles purchased, and demand the consideration paid, in order to rescind the contract, we think the tender and demand by the plaintiff's wife sufficient.

The mother will be presumed to have the more intimate and special charge of the habits and well-being of her child of such tender years, and the exercise of the parental duty of guarding the child from profligacy and dissipation. And the return of this fancy and foolish outfit for childish dissipation, and demand that the money paid for them should be returned, especially when the husband adopts the act by bringing this suit, should be presumed, in

Hoadley v. Watson.

law and in fact, to have been done with his sanction and authority. But the defendant treated her as authorized to make the demand, and offered to return the money, except a small fraction.

And inasmuch as the plaintiff, by this suit, adopts and ratifies her act, the defendant cannot be permitted, now, by pretending that he omitted to do his duty because he supposed the wife not authorized to retain the money.

There is another quite satisfactory answer to the defendant's claim. There were no exceptions taken to this part of the case. The defendant "asked the court to rule, as a matter of law, that the plaintiff could not recover *in his own name*, the money so paid by the minor son to the defendant." No question was made as to the sufficiency of the *demand*.

The court, sitting in error, can only try such errors as are *specified* and brought up on exceptions. The habit that has sometimes obtained of "*dragging*" a case in this court, as for something lost, to find a fault that was undiscovered and unheeded in the trial of the cause, is ever unavailing to the client, and a deviation from professional propriety and duty.

Judgment affirmed.

HOADLEY v. WATSON.

(45 Vt. 289.)

Damages — in actions for assault and battery — exemplary damages.

In trespass for assault and battery, the fact that the defendant has been tried in a criminal proceeding for the same act is no bar to, or mitigation of, exemplary damages; but plaintiff's expenses in the suit, not taxable costs, are not proper items of such damages. (*See note, p. 199.*)

TRESPASS for assault and battery. Plea, the general issue. At the trial the defendant offered in evidence, for the purpose of mitigating damages, and upon the question of exemplary damages, the record of a judgment against himself in a criminal proceeding for the same assault, and on complaint of this plaintiff. The offer was rejected.

The court charged upon the question of exemplary damages as follows:

"If you find that the assault was wanton in its character, and unprovoked, you are at liberty to give what the law denominates exemplary or punitive damages, and whether you will give them or not, is a matter entirely within your discretion. Where the act is not wanton in its character, and where it appears to be innocent in intent, the jury are not, as a general rule, to give exemplary damages. The object of exemplary damages is twofold in its character. One object is to remunerate the party for the expense he is put to in the assertion of his right, which is not taxable costs. Another object is for the sake of example to others — as a sort of punishment to the party, and to act as a sort of restraint upon others from committing similar acts."

Davis & Adams, for plaintiff.

A. G. Safford, for defendant.

WHEELER, J. 1. Exemplary damages are not given in lieu of punishment. The fact that in a civil action founded on a criminal act, the guilty party had been compelled to pay exemplary damages to the party injured on account of the act, would be no bar to a prosecution in a criminal proceeding for the same act, nor to any part of the fine imposed by law upon such offenses. Neither should the liability to, nor the actual imposition of, a fine in a criminal proceeding, bar any portion of the liability in a civil action for the same act. This was the doctrine announced by the very able court in *Cook v. Ellis*, 6 Hill, 466, and approved in *Sedgwick on Damages*, 462. The liability to both criminal punishment and to such damages as a jury may impose in a civil suit, is the consequence of any act that is criminal, and also creates a civil liability.

2. Exemplary damages grow entirely out of the nature of the act of the defendant for which the plaintiff recovers. They are given in enhancement, merely, of the ordinary damages, on account of the bad spirit and wrong intention of the defendant manifested by the act, and are recoverable with the ordinary damages, under the common allegation that the act declared for was done to the damage of the plaintiff.

3. The charge in this case in respect to the object of exemplary

Hoadley v. Watson.

damages, is similar to that in *Earl & Wife v. Tupper*, heard at the same term with this case, and is considered to be erroneous for the same reasons, and for that error the judgment must be reversed.

Judgment reversed and cause remanded.

NOTE. — *Earl v. Tupper*, 45 Vt. 375, was also trespass for assault and battery, and was tried before the same judge as the foregoing case. The opinion in the case disposes of several questions, but as the one referred to in the foregoing opinion is the only one of general interest, it has been thought best to give that part of the opinion relating to it, in this connection :

WHEELER, J. "VII. Except in the particular just treated of, the charge of the court as to actual damages appears to have been satisfactory. But after charging fully in respect to actual damages, the court appears to have further charged that if the jury found the assault was committed in the manner and under circumstances indicating malice, they were at liberty to give exemplary damages. That the object of exemplary damages was twofold ; to compensate the party fully for his expenses and trouble he had been to about the case, that parties always have to incur, not taxable costs, but counsel fees, etc., and for the purpose of example, as a sort of punishment for the party who offends, and that if they came to the question of damages, and believed that the actual damages were not sufficient, and not as much as justice required between the parties, then they were at liberty, under the instructions, to give such exemplary damages as they thought the case might require at their hands ; and to this the defendant excepted. To what extent a plaintiff has a right to have the jury go in awarding damages where insult, indignity, and wounded honor and sensibilities, are a direct consequence of the injury recovered for, is not in question and necessary to be determined here ; but the question is as to the right of the parties in respect to exemplary damages beyond just compensation for the injury recovered for. The doctrines as to such damages appear to have grown up out of the refusals of courts to grant new trials on account of excessive damages, in cases where the verdicts were greatly in excess of any possible pecuniary loss, but the injury recovered for was attended with malice, oppression, gross fraud, or negligence. In such cases, such motions were usually overruled, unless it appeared that the jury were influenced by passion or prejudice, on the ground that the jury might, in their discretion under such circumstances, visit the defendant with greater damages against him, to show with what detestation they viewed such conduct as they found him guilty of, and to administer wholesome correction for it by way of example. Afterward it came to be the practice of courts to instruct the jury that they were at liberty to enhance the damages in such cases for those purposes. This was instructing the jury beforehand how far they might go without exposing their verdicts to be set aside. This is now the settled practice in this and most of the other States. There are a few cases, and among these, some relating to patents, where the liability of defendants has been increased on account of their conduct in resisting the liability whereby the expenses of plaintiffs in obtaining remedy were increased. These patent cases are said to rest somewhat upon the peculiar provisions of the statutes, and the others have not been generally followed.

"The great weight of authority seems to be opposed to the allowance of counsel fees, and other expenses of litigation, beyond taxable costs, as an element of damages, even in cases proper for exemplary damages. At least, there is so much authority that way, that this court is at liberty to disregard those the other way, if necessary, in order to follow the rule most in accordance with legal principles and sound reason. In this State, and in most, and, probably, all the others, the legislature has taken cognizance of the propriety and justice of allowing costs to some extent in favor of winning against the losing party. In this State, provision is made for attorneys' fees, and there is no distinction in law here between attorneys and counsel ; and, although the provision made is probably very small in comparison with the actual expense in most cases, it is as much as the law-making power has seen fit to make it, and courts and

juries have no power to allow more, any more than they would have if it was large enough to cover all such actual expenses. The power over this subject rests entirely with the legislature, and that has not made any provision for allowing actual expenses as damages in any case, although it has made some distinction as to costs in cases arising from the willful and malicious acts of defendants. A party in an action upon contract may be as malicious, and may put the other party to as much expense, as in an action of tort for an act that was malicious, and no good reason is apparent why these expenses should not be considered as much in one of these cases as the other. The true rule seems to be, that the plaintiff is entitled, as a matter of right, to recover compensatory damages for the injury done him by the act recovered for, with his legal costs, and that the jury, in cases proper for exemplary damages, are to be governed wholly by the malice or wantonness of the defendant, as shown by the conduct they find him liable for in the action, in awarding them.

"The charge in this case left the jury at liberty to consider the expenses of the suit to the plaintiff for counsel fees and trouble, not taxable costs, and to allow these expenses to the plaintiff as a part of the exemplary damages, if they saw fit. This is considered to have been erroneous." — REX.

STATE V. PATTERSON.

(45 Vt. 306.)

Dying declarations. Communication between court and jury. Homicide — burden of proof. How far one's house is his castle.

In order to make dying declarations admissible in evidence, it is not necessary that the declarant state every thing constituting the *res gesta* of the subject of his statement; but only that his statement of any given fact be a full expression of all that he intended to say as conveying his meaning as to such fact.

On the trial of an indictment for homicide, where the facts proved by the prosecution show that the defendant claimed to do the act resulting in death in self-defense, the burden of proof rests upon the prosecution to show, beyond reasonable doubt, that the act was criminal.

After a jury had retired to consider of their verdict, the court sent to them, in answer to their request, an instruction in writing, and, also, a copy of the statute, without the knowledge of counsel on either side. *Held*, error.

A man's house is his castle only in the respect that it is sacred for the protection of his person and family. An assault on the house can be lawfully resisted to the extent of using deadly weapons, only in case the assault is made with the intent either of taking the life of the inmate, or of doing him great bodily harm, and such resistance is necessary to prevent such crime; or in case the inmate has reason to believe from the circumstances, and, in fact, does believe that it is necessary to prevent the commission of such crime. (*See note, p.* .)

State v. Patterson.

INDICTMENT for manslaughter. Plea, the general issue. The evidence, on the trial, tended to show that in May, 1871, the prisoner was living with his wife, mother and sister in a tenement house in St. Albans; that on the evening of the transaction, after the prisoner had gone to bed, Flanders, the deceased, and one Watson, then being under the influence of liquor, went to the house and knocked at the door. Defendant raised his window and asked what they wanted, and they replied that they wanted to come in. Defendant told them they could not come in; they insisted that they would, and growing more violent, used abusive language and threatened to smash in the door, and to break in his head if he would come down. One of them threw a brick or stone through the window. Then one of them started toward the door, whereupon defendant went to another room, got a gun which was loaded with shot, put the barrel on the window-sill and shot, mortally wounding Flanders. Defendant testified that he fired to the ground, and that his object was not to hit them, but to scare them away.

The prosecution to prove Flanders' dying declarations introduced one Hill, who testified that he saw Flanders after he was shot; that in answer to his inquiries he made statements concerning the occurrence connected with the shooting; that he was so weak witness could only get detached statements in the intervals between spells of vomiting; that he took his words on paper at the time, but the paper was lost. This evidence of the dying declaration was admitted over defendant's objection.

The part of the charge objected to is stated in the opinion.

After the jury had retired to consider of their verdict, they sent the following written inquiry to the court by the officer having them in charge: "What is the law in relation to manslaughter in the third degree, or what is the punishment for manslaughter in the third degree?" and the presiding judge, while the court was in session and the jury in their room for deliberation, without the knowledge of the respondent or his counsel, or the counsel for the State, sent to the jury in their room, and without their coming into open court, the following communication in writing: "There are no degrees in manslaughter under our laws; but the amount and kinds of punishment that shall be inflicted you will see are, with certain limitations, in the discretion of the court;" and the court sent the General Statutes to the jury in their room, and referred

them to section 15, chapter 112. The jury returned a verdict of guilty and respondent excepted.

Farrington & McIntyre and Benton & Irish, for respondent.

Ballard & Wilson, for State.

BARRETT, J. It is objected in behalf of the respondent that the dying declarations of Flanders, as testified to by Mr. Hill, should have been excluded from the consideration of the jury, by force of the rule as stated 1 Greenl. Ev., § 159, viz., that "whatever the statement may be, it must be complete in itself; for, if the declarations appear to have been intended by the dying man to be connected with, and qualified by, other statements which he is prevented by any cause from making, they will not be received." What we understand by the expression, that the statement "must be complete in itself," is, not that the declarant must state every thing that constituted the *res gestæ* of the subject of his statement, but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact. This is plainly indicated by the closing part of the above quotation, as to the declarations made being intended by the dying man to be connected with, and *qualified* by, other statements which he is prevented from making. There is no indication in the testimony given by Mr. Hill that Flanders intended what he said to Hill should be qualified by any thing that he wished to say, and was prevented from saying, or did not say. The fact that Mr. Hill had lost the paper containing the declarations in writing does not bear on the question. It may have some bearing as to the weight which ought to be accorded to the evidence thus given, as depending on the accuracy of his recollection and his correctness in repeating from memory what Flanders said to him. But this, in that respect, is only the common case of comparative reliableness, as between the statement of facts orally from memory, and the statement of them in written memoranda made at the time the facts occurred.

The fact that Flanders made his statement in intervals between vomitings does not touch the question of the competency of the evidence, unless it should appear that by such vomitings, he was prevented from expressing his meaning in relation to the facts that he was undertaking to state. By recurring to the testimony of Mr

Hill, given in full in the reporter's minutes, it will be seen that the facts are few and simple, about which the dying man undertook to speak; and there is nothing in their nature that would seem to require any thing more to have been said in order to get the meaning that he intended to convey in respect to them. The manner and circumstances of the making of the dying declarations are proper for consideration, in giving effect to them as evidence in the case, much the same as if the deposition of the dying man had been taken, and given in evidence on the trial.

II. The court charged the jury that if they were convinced beyond a reasonable doubt that the death of Flanders was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment * * * that all killing is presumed to be unlawful; and when the fact of the killing is established, it devolves on the party who committed the act, to excuse that killing — to show that it was justified — in order to escape the legal consequences which attach to the commission of the act." In this we think there is error. As to the rule of presumption, as affecting the burden of proof, as it is ordinarily found in the books on criminal law, especially the older ones, it suffices to refer to the remarks of Ch. J. REDFIELD, in *State v. McDonnell*, 32 Vt. 538-9. Yet, with reference to that rule, as it was applied to the present case, the statement of it in Foster's Crown Law, 255, is worthy of notice. "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, *unless they arise out of the evidence adduced against him*, for the law presumeth the fact to have been founded in malice, until the contrary appeareth." In Roscoe's Crim. Ev. 20, that quotation is preceded by this statement, viz.: "When a man commits an unlawful act *unaccompanied by any circumstances justifying its commission*, it is a presumption of law that he acted advisedly, and with an intent to produce the consequences which have ensued."

In *York's case*, 9 Metc. 93, the meaning of the rule is peculiarly indicated by the manner in which Ch. J. SHAW stated it: "That where the killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious, and an act of murder." That meaning is made palpable and is illustrated by the same great judge in *Hawkins' case*, 3 Gray, 465, in which he says, "that this was inapplicable to

this (*Hawkins'*) case, where the circumstances attending the homicide were fully shown by the evidence." And on this point he instructed the jury that "the murder charged must be proved; the burden of proof is on the commonwealth to prove the case; all the evidence on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter."

In *McKie's case*, 1 Gray, 61, on an indictment for assault and battery with a dangerous weapon, the subject of the burden of proof in that class of offenses was fully considered by the court, and instructively discussed by BIGELOW, J., in the opinion of the court drawn up by him. He says: "It appears that the justification on which the defendant relied was disclosed, partly by the testimony introduced by the government, and in part by evidence offered by the defendant; and that it related to and grew out of the transaction or *res gestæ* which constituted the alleged criminal act." The result is stated thus: "But in cases like the present, * * * where the defendant sets up no separate independent fact in answer to the criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful." Preceding this extract, it is said "Even in the case of homicide, where a stricter rule has been held as to the burden of proof than in other criminal cases, upon peculiar reasons applicable to that offense alone, it is conceded that the burden is not shifted by proof of a voluntary killing, where there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide;" citing *York's case*, *supra*, and *Webster's case*, 5 Cush. 305.

We adopt the views thus shown, in their application to the present case, so far as to hold that, with reference to the state of the evidence given on the trial, the jury should not have been instructed, as they were in the parts of the charge above recited, but should have been instructed, in substance, that upon all the evidence, they must find beyond a reasonable doubt that the crime charged in the indict-

State v. Patterson.

ment was committed by the respondent, in order to warrant his being found guilty, with proper adaptations of the instructions to this feature of the case, as presented in the course and manner of the trial.

III. The exception to the communication of the presiding judge with the jury, and sending to them a copy of the statutes, with a reference to a particular section, is maintained. The prevailing idea in this State has been that all communications between judge and jury, after a case has been submitted to the jury and while they have it in consideration, should be in open court, and, so far as we know, the practice has been conformable to this idea.

In 1 Pick. 242, *Sargent v. Roberts et al.*, Ch. J. PARKER says: "We are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court, and, when practicable, in presence of the counsel in the cause." See *Taylor v. Bettsford*, 13 Johns. 487.

As to furnishing the jury with a copy of the statutes, we regard the rule to be equally distinct and decisive, not only in this State, but elsewhere. *Burrows v. Unwin*, 3 C. & P. 310. In *Merrill v. Nary*, 10 Allen, 416, a copy of the statutes was carried to the jury at their request, and with the consent of the judge. This was held to be improper; and the proper views applicable to the subject are so amply set forth in the opinion delivered by BIGELOW, Ch. J., as to render it needless to do more than refer to that opinion.

In other respects, we deem the charge to be conformable to the established principles of the law as promulgated in the text-books and treatises, and applied and illustrated in the decided cases. From what is made known to us by the bill of exceptions as to the evidence given and the facts proved on the trial, we fail to discover in the charge ground or occasion for such a character and spirit of criticism as was exhibited in the argument before this court. On the other hand, I am commissioned to express the full conviction of each member of this court, that the utmost fairness toward the respondent, and great painstaking that he should suffer no abatement from the legitimate force of his defense were exercised by the presiding judge.

From experience at the bar and on the bench, we very fully understand that many things in the features and details of a charge to the jury are prompted by, and are addressed to, peculiar features

and details of the argument that has preceded. From the requests and points of exception stated in the record before us, together with the arguments which we have here heard, the present case seems not to be exceptional in that respect. If we had before us the arguments addressed to the jury, with the same verbal fullness that we have the charge of the court, it seems quite presumable that we should find reason to admire, if not to be surprised at, the self-poise with which the presiding judge bore himself in the charge, as against operating prejudice to the respondent.

It is not deemed needful for the purposes of this case, with reference to its future prosecution, to discuss specifically any other subject, except that of the dwelling-house being one's castle, as bearing upon his right to kill or to use deadly weapons in defense of it. This is presented in the third request in behalf of the respondent, which is, in the language used by HOLROYD, J., in charging the jury in *Meade's Case*, *infra*, viz.: "The making of an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." The purpose of this request seems to have been, to justify the killing with the gun, as a lawful mode and means of defending the castle, as well as the person within it. Looking to the state of the evidence, it is not altogether obvious what there was in the case to warrant its being claimed that the respondent killed Flanders as a measure of force, to repel and prevent him from breaking into the house. Moreover, in the exceptions it is said: "The respondent testified that he fired to the ground, and the object in firing was, not to hit them, but to scare them away." The respondent seems not to have regarded it a case, or a conjuncture, in which it was needful or expedient to use a deadly weapon as a means of forceful resistance to meet and repel an assault on his house — whatever such assault in fact was — or to protect himself from any threatened or feared assault on his person. The gun, loaded with powder alone, would have served all the needs of the occasion, and of the exigency which the respondent supposed then to exist and to press upon him.

Nevertheless, the point was made by said third request. It was indicated in the charge that the case, *State v. Hooker*, 17 Vt. 670, was invoked in support of it, and it is cited in this court for the same purpose. That case professes to decide only the question involved in and presented by it, viz.: whether it was criminal under the statute for the respondent to resist an officer in the ser-

vice of civil process within his dwelling-house, such officer having unlawfully broken into the house for the purpose of making such service. The language of the opinion is to be interpreted with reference to the case and the question. That case in no respect involved the subject of the use of a deadly weapon with fatal effect in defense of the castle; and it is not to be supposed that the judge who drew up the opinion was undertaking to discuss or propound the law of that subject.

To come, then, to the subject as it is involved in this case under said third request. In Foster's Crown Law, 319, it is said: "The books say that a man's house is his castle for safety and repose to himself and family." In *Cook's case*, Cro. Car. 537, an officer, with a *capias ad satisfaciendum*, went with other officers, for the purpose of executing the same, to the dwelling-house of the respondent, and, finding him within, demanded of him to open the door and suffer them to enter. He commanded them to depart, telling them they should not enter. Thereupon, they broke a window, and afterward went to the door of the house and offered to force it open, and broke one of the hinges; whereupon Cook discharged his musket at the deceased and hit him, and he died of the wound. "After argument at the bar, all the justices, *seriatim*, delivered their opinions, that it was not murder, but manslaughter; the bailiff was slain in doing an unlawful act in seeking to break open the house to execute process for a subject, and every one is to defend his own house. Yet they all held it was manslaughter; for he might have resisted him without killing him; and when he saw and shot voluntarily at him, it was manslaughter.

That was one of the earliest cases, and was fully considered; and it has been cited in all the books on criminal law since its decision in 1640 (15th Car. I.) — with some incorrectness of statement, in 1 Hale's P. C. 458, and in other books adopting Hale's text. This is in some measure rectified by a remark, 1 East's P. C. 321, 322. See, also, Roscoe's Cr. Ev. 758; also 1 Bishop's Cr. L. § 858, n. 2 (5th ed.). It is to be specially noticed that what made it manslaughter was, that, in order to defend his castle, it was not necessary to kill the bailiff.

The same idea of *necessity*, in order to relieve the killing from being manslaughter, exists in the case of defending one's person, as stated in Hawkins' P. C. 113: "Homicide *se defendendo* seems to be when one who has no other possible means of preserving his life

from one who combats him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such an inevitable necessity."

In a learned note in 2 Archb. Cr. L. 225, it is said: "But when it is said that a man may rightfully use as much force as is necessary for the protection of his person and property, it should be recollected that this rule is subject to this most important modification — that he shall not, except in extreme cases, endanger human life, or great bodily harm. * * * * You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. It is, therefore, clear, that if one man deliberately kills another to prevent a mere trespass on his property — whether that trespass could or could not otherwise be prevented — he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own."

Harcourt's case, 5 Eliz. stated 1 Hale's P. C. 485, 486, shows that this doctrine is not new. "Harcourt, being in possession of a house by title, as it seems, A. endeavored to enter, and shot an arrow at them within the house, and Harcourt, from within, shot an arrow at those that would have entered, and killed one of the company. This was ruled manslaughter, and it was not *se defendendo*, because there was no danger of his life from them without." What was thus ruled is the key to the author's meaning in the next following paragraph of his book, which see.

The idea that is embodied in the expression that a man's house is his castle, is not that it is his *property*, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such an assault be injury to the person of the occupant or members of his family, and, in order to accomplish this, the assailant attacks the castle in order to reach the inmates. In this view it is said and settled that,

State v. Patterson.

in such case, the inmate need not flee from his house in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

This is the meaning of what was said by HOLROYD, J., in charging the jury in *Meade's case*, 1 Lewin's C. C. 184. Some exasperated sailors had ducked Meade, and were in the act of throwing him into the sea, when he was rescued by the police. As the gang were leaving, they threatened that they would come by night and pull his house down. In the middle of the night a great number came, making menacing demonstrations. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Meade was indicted for murder. Upon that state of facts and evidence, the judge said to the jury: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger, etc. * * * But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle; and, therefore, in the eye of the law, it is equivalent to an assault, but no words or signals are equivalent to an assault; nor will they authorize an assault in return, etc. * * * There are cases where a person in heat of blood kills another, that the law does not deem it murder, but lowers the offense to manslaughter; as, where a party coming up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. In the present case, if you are of opinion that the prisoner was really attacked, and that the party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he, perhaps, was justified in firing as he did. If you are of opinion that he intended to fire over and frighten, then the case is one of manslaughter and not of self-defense.

The sense in which one's house is his castle, and he may defend himself within it, is shown by what is said in 1 Hale's P. C. 486, that "in case he is assaulted in his own house, he need not flee as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to the adversary by flight." Now, set over against that what is said in 1 Russell, 662, and the true distinction between the house as *property*, on the one hand, and as *castle for protection* on the other, is very palpable, viz.: "If A, in defense of his house, kill B, a trespasser, who endeavors to make an entry upon it, it is, at least, common manslaughter, unless, indeed, there were danger of life;" p. 663. "But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of a deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass." In *Carrol v. The State*, 24 Ala. 36, it is said: "The owner may resist the entry into his house, but he has no right to kill, unless it be rendered necessary in order to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm." Cited 2 Bish. Crim. Law, § 707, 5th ed. That case impresses us differently from what it does the learned author, as indicated by his remark prefacing the citation.

As developing and illustrating the prevailing idea of the law as to what will justify homicide *se et sua defendendo*, it is not without interest upon the point now under consideration, to advert to what is said upon the general subject. In McNally, 562, it is said: "The injured party may repel force by force in defense of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger; and if in such conflict he happeneth to kill, such killing is justifiable." Wharton incorporates this into his work as text. The same is found in the older books. 1 Hale, 485, 486; also in Foster's Crown Law, 273; 1 Russell, 667; and in other books, *ad lib.* But, to apprehend this in its true scope and application, it is important to have in mind what is said in 1 Russell, 668: "The rule clearly extends only to cases of felony; for if one come to beat another, or take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him,

State v. Patterson.

it is manslaughter. * * * No assault, however violent, will *justify* killing the assailant under a plea of necessity, unless there be a manifestation of *felonious* intent." See Archb. Crim. Law, 221, cited *Reg. v. Ball*, 9 C. & P. 22.

This covers the cases of statutory justification of homicide, both under our own and under the English statutes, and, in principle and in reason, it is in keeping with the common law as to *se defendendo*, in defining the scope of which in this respect, it is well laid down that, "before a person can avail himself of the defense that he used a weapon in defense of his life, it must appear that that defense was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger." 1 Russell, 661.

The law of the subject, as given in the books thus cited and referred to, seems to have been adequately apprehended by the court, and, so far as we can judge from what is shown by the record before us, it was not administered erroneously or improperly in the trial, as against the respondent.

If it were to be assumed that the defense might legitimately claim that there was an assault on the house, with the intent either of taking the life of the respondent, or doing to him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime, or if, under the existing circumstances attending the emergency, the respondent had reason to believe, and was warranted in believing, and, in fact, did believe, that it was necessary in order to prevent the commission of such crime. In case the purpose of the assailant was to take life, or inflict great bodily harm, and the object of his attack (if there was such attack) upon the house was to get access to the inmate occupying the same, for such purpose, the same means might lawfully be used to prevent him from breaking in, as might be used to prevent him from making the harmful assault upon the person, in case the parties were met face to face in any other place. In either case, the point of justification is, that such use of fatal means was necessary in order to the rightful, effectual protection of the respondent, or his family, from the threatened or impending peril.

We have been led to this discussion and exposition of the law as to the defense of the dwelling-house, on account of the somewhat fragmentary and disjointed condition in which it is done up in the

books and cases of criminal law, and for the purpose of rendering as explicit as we are able the views of this court on that subject, as it has been brought into question and debate in the case in hand. In this exposition, and in the views embodied in this opinion, all the members of the court concur.

The other subjects involved in grounds and points of defense, as shown by the bill of exceptions, and upon which the court gave instructions to the jury, do not seem to require discussion.

The verdict is set aside, and a new trial granted.

NOTE.—The resolution of the judges in *Semayne's Case*, 5 Coke, 91, was "that the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose; and, although the life of a man is a thing precious and favored in law, so that although a man kills another in his defense, or kills one *per trifortun*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 8 E. 3; Coron, 302 and 305, and 36 Ass. pl. 23. So it was held in H., 7, 39; every one may assemble his friends and neighbors to defend his house against violence; and the reason of all this is, because *domus sua cuique est tutissimum refugium*."

Lord HALE says: "A is in possession of the house of B. B endeavors to enter upon him. A can neither justify the assault or the beating of B, for B had the right of entry into the house; but if A be in possession of a house, and B, as a trespasser, enter without title upon him, A may not beat him, but may quietly lay hands upon him to put him out, and if B resists and assaults A, then A may justify the beating of him as of his own assault. But if A kills him in defense of his house, it is neither justifiable nor within the privilege *se defendendo*, for he entered as a trespasser, and, therefore, it is, at least, common manslaughter," and he cites Harcourt's case in support of this, who, "being in possession of a house, A endeavored to enter, and shot an arrow at those who have entered, and killed one of the company, which was ruled manslaughter, and not *se defendendo*, because there was no danger to his life from those without." 1 Hale's P. C. 485-6.

Hawkins says: "Neither can a man justify the killing of another in defense of his house or goods, or even of his person, from a bare private trespass, and, therefore, he that kills another who, claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges, after he was forbidden, is guilty of manslaughter." Hawkins, 88.

Mr. Wharton, in his Criminal Law (7th ed.), Vol. 2, § 1024, says, "so highly indeed does the English common law cherish the sanctity of the dwelling-house, that it has been said that a man is justified by that law in opposing, even to death, those seeking to break into it. When in his house the owner is at bay; he is called upon to retreat no further; and in this, his castle, he may use any violence, even to the extent of slaying his assailant, to resist an illegal entrance. * * * But this should not be strained to excuse the killing of assailants not actually breaking into a house, after due warning of the consequences, nor attempting a felony after such warning."

Mr. Bishop says, 1 Criminal Law (5th ed.), § 858: "Moreover the general doctrine, as to the defense of property, does not prevail as respects the defense of what is sometimes termed the castle. In the early times our forefathers were compelled to protect themselves in their habitations, by converting them into holds of defense; and thus the dwelling-house was called a castle. And while a man keeps the doors of his house closed, no other man has the right to break in under any circumstances, except

State v. Patterson.

in particular cases where it becomes lawful for the purpose of making an arrest of the occupant, or the like; cases which it is not within our present line to consider. And from this doctrine springs another; namely, that the persons within the house may exercise all needful force to keep the aggressor out, even to the taking of his life." In the note thereto the author adds, after citing several cases, "While the doctrine of the text is clear on principles, it is not so distinctly and uniformly sustained by the authorities as we might wish." Again, after treating of the defense of the person and of property, he says, Vol. 2, § 707: "The defense of the dwelling-house stands on a different ground. And though the question has at some periods of our law been in part under a cloud, it may now be deemed to be reasonably clear, that, to prevent an unlawful entrance into a dwelling-house, the occupant may make defense to the taking of life, without being liable even for manslaughter. Of course, a defense may be of a sort which will constitute manslaughter, or even murder."

The question was quite fully discussed in *Pond v. People*, 8 Mich. 150. The deceased, with others, had expressed an intention to do the prisoner personal violence; had struck him and kicked him; had the same night, after this violence, gone to his house and demanded him, but not finding him went away, had met him again the next day and threatened him and treated him with violence; had gone again that night to prisoner's house and endeavored to force an entrance, and then went to a net-house, thirty-six feet from the main house, where the prisoner's servants were sleeping, laid violent hands on the servants, and began tearing down the house. The prisoner, from the door of his house, thereupon, after warning, fired and killed the deceased. The court held that the net-house was a part of Pond's dwelling-house, and granted a new trial, saying in the conclusion of the opinion: "We think there was error in requiring the actual, instead of apparent and reasonably founded causes of apprehension of injury, in holding that the protection of the net-house could not be made by using a dangerous weapon; and that the conduct of the assailing party was not felonious; and also in using language calculated to mislead the jury upon the means and extent of resistance justifiable in resisting a felony." During the discussion, the court used this language as to the right of self-defense: "The danger to be resisted must be to life, or of serious bodily harm of a permanent character, and it must be unavoidable by other means. Of course, we refer to means within the power of the slayer, so far as he is able to judge from the circumstances as they appear to him at the time. A man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life. But here, as in the other cases, he must not take life if he can otherwise arrest or repel the assailant. Where the assault or breaking is felonious, the homicide becomes justifiable and not merely excusable."

In *Patten v. People*, 18 Mich. 314, the defendant was convicted of manslaughter. The deceased and a number of others went to defendant's house to "horn" him, he having been newly married. They had guns, tin horns, etc., for the purpose of making a noise. While they were making the noise in the yard near the house, the prisoner came out and ordered them away and they left. The next night they returned for the same purpose, and while they were blowing horns, shooting guns, etc., the prisoner came out and struck the deceased with an axe. There was no evidence of an attack upon the house or any of its inmates, further than that while the door was open wads from some of the guns were fired into the house; the evidence also tended to show that the prisoner understood the object of the rioters, and that it was not personal injury to himself or family, but there was also evidence that before the prisoner stepped out there were cries "to bring him (or fetch him) out."

The court held that "considering the case first with reference only to the facts existing prior to the time when the defendant went out with the axe," there was nothing to justify the assault with the axe, "until some actual violence had been done or attempted in this case against either the house or its inmates, the necessity which alone could excuse taking the life of any of the assailants, had not yet occurred and might never occur." But the court further held that if owing to the feeble health and peculiar infirmities of the prisoner's mother, who was in the house with him, the

Johnson v. Muzzy.

fear and excitement occasioned by the riot produced upon her alarming effects, from which her speedy death might reasonably have been apprehended, and if the rioters were informed of her condition, and the effect produced by their conduct, or if every reasonable effort had been made to inform them thereof, then the danger to the mother would excuse the conduct of the prisoner to the same extent as if the danger to her life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him.

In *Graschia v. People*, 58 Ill. 295, the deceased had been in the prisoner's room for his clothes and as he was departing the prisoner made some offensive remark, whereupon he suddenly turned and in an angry mood went toward the prisoner, who had told him to "come on;" as the deceased advanced to the door of the room, and was in the act of entering it, it being open, the prisoner struck him with a rolling pin, inflicting a fatal wound. The court held that the prisoner was in no respect excused.

In *Carroll v. State*, 23 Ala. 23, the court, after citing and commenting on some of the older authorities, said: "Our conclusion is that a mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as, with a deadly weapon. For trespass with force, it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm. If he kills when there is not a reasonable ground of apprehension, of immediate danger to his person or property, it is manslaughter; and if done with malice, express or implied, it is then murder." Mr. Bishop expresses some dissatisfaction with this statement of the law, 2 Crim. Law, § 707, n. 5; but the decision in the case was, under the facts, clearly right.—RMP.

JOHNSONS V. MUZZY.

(45 Vt. 412.)

Deed — covenant by lessor against lessee.

Action of covenant for rent by lessor against lessee, on a lease by deed-poll, signed and sealed by the lessor only, and which the lessee had accepted and occupied under. *Held*, that the action would not lie.

COVENANT FOR RENT. Plea, *non est factum*, accord and satisfaction and set-off. The opinion states the necessary facts. Judgment was rendered for defendant, and plaintiff excepted.

Waterman & Read, for plaintiff.

A. Stoddard, for defendant.

ROYCE, J. This is an action of covenant, brought to recover for the rent of certain premises situate in the village of Jamaica. The

Johnsons v. Muzzy.

declaration alleges that the plaintiffs and the defendant made a certain indenture, dated the 20th day of August, 1862, which was sealed with their seals, and that in and by said indenture, the defendant, among other things, covenanted and agreed to pay the rent, for the recovery of which this suit was brought.

The defendant pleads *non est factum*. The plaintiffs offered in evidence the lease of the premises described in the declaration, accompanied with the offer to prove that the defendant accepted the lease, entered into possession of the premises under it, and occupied the same during the full term named therein, and had never paid the rent.

It appeared from the lease that it was signed, sealed and acknowledged by the plaintiffs, and recorded in the town clerk's office in Jamaica, on the 20th day of August, 1862, but had never been signed or sealed by the defendant; and upon the objection of the defendant, it was excluded. The only question reserved was as to the correctness of this ruling.

The general rule is, that covenant will lie only where the instrument is actually signed and sealed by the party, or by his authority. But it is claimed by the plaintiffs that there are exceptions to this rule, and that this case comes within one of them. In 1852, the case, *Israel House v. Wm. Foster*, was heard and decided by the supreme court in Washington county.

That was covenant, and it was alleged in the declaration that on the 7th day of March, 1841, the plaintiff, by a deed duly executed, conveyed to the defendant a certain farm, reserving to himself the fruit of the orchard for ten years, and that the defendant, in and by said deed, covenanted to keep the orchard well fenced, and to preserve it from depredation by cattle, etc.; and it appeared that the defendant accepted the deed, and possessed and held under it. The plea was *non est factum*, and the deed when produced in evidence appeared to have been signed and sealed by the plaintiff only. The court held that it was not, in legal contemplation, the deed of the defendant, and that covenant would not lie.

This case has never been reported, but I have the manuscript of the opinion delivered by Judge ROYCE, and have been thus particular in stating its facts, for the reason that it seems to me that there is such an analogy between that case and the one under consideration that we cannot reverse the ruling in this, without virtually overruling that. But if this is to be regarded as still an open ques-

tion, we are unable to find that the plaintiffs have brought themselves within any recognized exception to the rule as above stated. That the defendant, by accepting the lease and holding under it, incurred an obligation to perform the acts therein stipulated to be performed for the lessor's benefit, cannot be disputed. But did he *covenant* to perform them? Much of the confusion to be found in the books upon this subject is, in my judgment, attributable to the loose manner in which the proposition is stated, and the apparent neglect in examining the authorities from which it is derived. The cases cited in the English books as authorities for the rule claimed by the plaintiffs, I think will all be found to have depended upon some custom, like the custom of London, where an action of covenant lay without a specialty. 22 Edw. 4, 2 a. Or, where the defendant derived title under a grant or patent from the crown. *Brett v. Cumberland*, Cro. Jac. 399, 521; Com. Dig., Covenant, A. 1; Vin. Abr., Covenant, A. 1.

The only case which I have been able to find in the English reports, which can be claimed as an authority for the extension of the rule beyond what is above indicated, is *Burnett et als. v. Lynch*, 5 B. & C. 589. In that case, the lessee, by deed-poll, assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises under the assignment, and before the expiration of the term, assigned to a third person. The lessor sued the lessee for breach of covenant committed during the time that A. continued assignee of the premises, and recovered damages against him. The lessee brought an action upon the case, founded in tort, against A., for having neglected to perform the covenants during the time he continued assignee, and the question was, whether the action would lie, and it was held that it would. ABBOTT, C. J., in the opinion, says: "I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained, except against a person, who, by himself, or some other person acting in his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as those mentioned in Co. Lit. 231 a) has agreed by deed to do a certain thing." It will be seen by reference to the *Year Book*, 38 Edw. 3, 8 a, from which the note in Co. Lit. is extracted, that the form of action in that case was debt, and as applicable to that form of action, there is no doubt that it is sound law. But the error has

been, wherever this authority has been cited, in a misapprehension of the form of action.

In *Hinsdale v. Humphrey*, 15 Conn. 433, it was held that an action of covenant would not lie against a lessee, or his assignees, for rent under a lease sealed by the lessor only, and that the acceptance of such a lease by the lessee is not such an assent to the stipulations contained therein as to make it his deed; and the same doctrine was held in a well-considered case reported in the 7th Ohio; and in *Goodwin v. Gilbert*, 9 Mass. 510, and in *Gale v. Nixon*, 6 Cow. 445, the court says that a recognition of the contract, though in writing and under seal, will not make it a covenant. We have seen but one American case where a contrary doctrine has been held, and that is *Finley v. Simpson*, 2 Zab. 311. So that, upon principle and authority, we think the ruling was right, and the judgment is affirmed.

PECK, J., dissenting.

VOL. XII. — 28

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BUTLER V. ROYS.

(25 Mich. 58.)

Tenant in common — sale on execution of undivided interest in single parcel.

The undivided interests of a tenant in common in distinct freeholds may be sold separately.

Judgment was recovered against C., who was a tenant in common with others, of several distinct parcels of land in the same county. Execution was levied on a part of the parcels only, and they were sold separately to plaintiff. In ejectment by plaintiff, defendant claimed title under a subsequent voluntary partition between the tenants in common. *Held*, that the parcels of land being distinct freeholds, C.'s interest in each might be sold separately; that the plaintiff, not having been a party to the partition, was not affected thereby, and that therefore plaintiff was entitled to recover.

EJECTMENT by Milton H. Butler against James A. Roys and others for an undivided one-ninth interest in certain city lots. The facts are stated in the opinion. The judgment at the circuit court was in favor of the defendant, and plaintiff brought error.

John J. Speed, E. W. Meddaugh, G. V. N. Lothrop and R. P. Toms, for plaintiffs in error.

S. Larned, D. B. & H. M. Duffield, Henry M. Cheever and C. L. Walker, for defendants in error.

Butler v. Roy.

CAMPBELL, J. The material facts for the decision of this cause are, that Joseph Campau having died seized of a large number of parcels of land of different values, in Wayne county and elsewhere and having left nine children as equal heirs, the interest of one of them, Theodore J. Campau, was sold on execution, not levied on such interest in all the lands in Wayne county, but on four separate city lots in Detroit, and the interest in each lot was sold separately. On a partition among the heirs, to which the purchasers were not made parties, these lots were set off to other heirs, and not to Theodore. The execution purchasers bring ejectment for their undivided interests in these lots, the present cause being on the same footing with the others, which are to abide this decision. The suit is defended on the ground that the execution sales were invalid, because covering parts and not all of the estate in common.

The question presented here was urged, but not decided, in certain suits in equity brought to set aside the execution sales. *Campau v. Godfrey*, 18 Mich. 27. It now becomes necessary to decide it, as disposing of the substantial rights of all parties concerned.

There are more *dicta* than decisions upon the precise point in litigation here, and we have rarely found a matter of so much importance on which so much has been carelessly said, and so much inferred without adequate authority. It is nevertheless important to have the rights of parties settled finally, and we have done what we could, with the aid of counsel, to satisfy our own minds on the subject. And upon the exact dispute involved here, we have, at least so far as our own views are concerned, got rid of the very serious doubts which seemed at first to involve the doctrines of the law in great confusion.

The principal controversy is not whether a tenant in common can convey his interest by metes and bounds in a part of an estate, but whether all of the various tenements held in common in a State, county or other municipal territory are to be regarded as one estate in common for all purposes of conveyance and partition. And this is the only question which we are required to pass upon in this controversy.

The lots in question in these actions of ejectment all belong to the Governor and Judges' plat of the city of Detroit, and are separate freeholds. No one of them appears to have been so combined with any other as to make them one indivisible holding by separate occupancy, by lease for a single and unapportioned rent, by sub-

jection to a single charge, or in any other way. And there is nothing to show that the possession of any one of them is necessary to the enjoyment of any other. The case is, therefore, presented very simply, and involves no peculiar complications.

The ground on which it is claimed no tenant in common can pass an undivided interest in any less than the whole estate, is that, by doing so, he prevents his co-tenants from any chance of obtaining the whole of the lesser tract in severalty, as they might otherwise do, in case a partition should be had. In other words, he limits their chances of getting entire lots to a smaller number of parcels, and may make it necessary for them to get a number of little tracts, instead of one or more larger ones.

This is a tangible grievance, and may become a very serious one. The only question for us to consider is, whether it is an interference with any legal right.

It will be found that the decisions holding or favoring this doctrine are all American, and all rely for authority upon the leading cases in Massachusetts. The few English decisions on which these latter rely (*Tooker's Case*, 2 Co. 68, and Cro. Eliz. 803, being the principal ones) are not decisions upon this subject, but only hold that joint tenants and tenants in common can do nothing to lawfully prejudice the estates of their co-tenants. They do not any of them hold, so far as we have been able to discover, that where there are several distinct freeholds, or estates, a disposal of an undivided interest in one of them would work a legal prejudice. And it is only unlawful acts which can do this. The whole ruling, therefore, is an assumption, unless founded on more specific authority, and must depend on controlling reasons, or must be considered as open to question. It will be seen, by a close inspection, that while the point involved in the case before us has been spoken of with some positiveness, there has been very little occasion to decide it.

Porter v. Hill, 9 Mass. 34, is the leading case. There a single large tract of land had been sold to joint tenants, who mortgaged it back for the purchase-money. The smaller parcels in which undivided interests were transferred were carved out of this estate, and the entire estate became vested in the grantor of the defendant. The case was decided without either citation of authorities or reasoning, the whole doctrine being laid down in these two sentences: "And one joint tenant cannot convey a part of the land, by metes and bounds, to a stranger. If he could, his grantee would become

Butler v. Reynolds

tenant in common of a particular part with the other joint tenant, who, in making a legal partition, might, notwithstanding, have the whole of the part thus conveyed, assigned as his property." This brief assertion, in a case where there was but one estate, and where it was a correct rule, has been made the starting point for all the decisions in the country, so far as they have been traced out, leading to a broader doctrine.

The next case was *Bartlet v. Harlow*, 12 Mass. 348, where there had been a levy by extent upon an interest in twenty acres out of a single tract of sixty acres. In this case, while it is said there is an absence of common-law authority to sustain such a transfer, and while an explanation is made of certain remarks of Lord COKE, as not fairly bearing such a construction as would favor it, the only unequivocal authority cited, is one from *Brownlow*, which very distinctly holds that where there are several estates there may be separate sales. *Porter v. Hill* is affirmed, and its reasoning somewhat expanded, and it is intimated finally, that the transfer might become operative, if, on partition, the land it covered fell to the defendant in execution. That case, then, is not in point beyond the force of its reasoning, if referring to different freeholds. It was not at all like this case, because a single estate was involved and no more.

Varnum v. Abbot, 12 Mass. 474, was a case where it does not appear there was more than one estate, though there were several conveyances of undivided interests, by the several tenants in common, in separate portions of it. No question was decided in that case beyond the validity of the conveyances as against the grantors, which was maintained. It was held, however, that separate actions were necessary against the disseisors of the various parts under those conveyances—a doctrine which is certainly sound, but which puts the co-tenants to the very trouble the main doctrine in the former cases was apparently designed to prevent.

In *Baldwin v. Whiting*, 13 Mass. 57, the premises consisted of one tract, and the case was decided on the previous authorities. The same is true of *Blossom v. Brightman*, 21 Pick. 283, 285. In *Nichols v. Smith*, 22 id. 329, there was no decision on the question at all, the deed being held good against the parties to the suit.

Peabody v. Minot, 24 Pick. 329, is the first case involving different parcels, and no question was raised or discussed in the argument concerning any difference between the transfer of interest in one of

several estates and in parts of a single estate. But in this case the court held, practically, that an interest in one of two distinct estates could be sold. The inheritance consisted of two parcels in Methuen, and four in Bradford, the latter being parts of one farm. It does not appear whether the lands in the two towns had been used together or not. The lands in Methuen, and three of the small parcels in Bradford, were assigned for dower. The court held the dower lands should be considered as a separate estate, and might be dealt with by themselves, without reference to the rest, which were not subject to dower; but held also that a transfer of an undivided interest in a specific portion of the dower lands was bad.

That decision, which is the only Massachusetts case we have found directly in point, seems opposed to the doctrine that undivided interests in distinct freeholds cannot be sold separately. In *Miller v. Miller*, 13 Pick. 237, the decision seems to rest on the same grounds. There a tenant in common asked partition of a mill-dam and its appurtenances, and it was refused on the sole ground that it was part of a single freehold. The court says: "We decide the case on the ground that the mill, dam, logways, water privilege and appurtenances constitute one entire tenement or holding of a freehold estate, and therefore the petition, being for partition of the dam and water alone, cannot be sustained. It is a well-settled rule of law, that a tenant in common cannot enforce partition of a part of the common tenement by metes and bounds." And they said separating mill and dam would destroy the estate.

Adams v. The Briggs Iron Co., 7 Cush. 361, held that the minerals and the soil could not be dealt with separately by a tenant in common, a question similarly decided in New Jersey, in *Boston Franklinite Co. v. Condit*, 4 Green. Eq. 374. In *Ex parte Bonner*, 4 Mass. 122, it was held, at a very early day, that two parcels in different counties could not be partitioned together, because not in one venue. Yet such parcels might be joined in one border farm.

The decisions referred to, however broad their intimations may be, do not operate as binding precedents for any doctrine applicable to cases where there are distinct freeholds. And, as they do not profess to rest on either English or American precedents, going to any such extent, they cannot absolve us from the necessity of considering the questions on common-law principles.

A somewhat careful investigation of cases cited, and some not

cited, in Maine, New Hampshire, Vermont, Connecticut, New Jersey, Maryland, Tennessee and Virginia, while it shows that the Massachusetts decisions underlie them all, and in many instances are asserted as maintaining the broadest doctrines, shows further, that in not more than five or six cases reported from all those States, so far as we can gather, was any question really in issue beyond rights in single tenures. And, except from the cases cited, they get no real support from any adjudications. They all rest on the theory of prejudice to the rights of co-tenants, and they generally allow the deeds to operate by estoppel.

In Ohio, however, the rights of tenants in common are left almost unlimited, since the case of *White v. Sayre*, 2 Ham. 110. And in some other States the distinction is recognized expressly between single and detached freeholds.

In *Starr v. Leavitt*, 2 Conn. 243, it was held improper to levy an extent on an undivided interest in two parcels, when an undivided interest in one would have satisfied the claim. The Massachusetts doctrine in regard to subdividing single parcels was nevertheless recognized, and has always been followed.

So in Maryland, in *Carroll v. Norwood*, 1 H. & J. 167, it was held that a single tract could not be cut up under a sale of undivided interests in parcels of it, but if the parties had themselves platted it into parcels, an interest might then be sold in any one of them. The same rule is recognized in *Reinicker v. Smith*, 2 H. & J. 421.

So in Missouri, in *Primm v. Walker*, 38 Mo. 94, it was held that platting lots for sale made separate estates of them, and interests in each might be conveyed.

In a majority of the States no discussion has arisen upon this particular question. From a review of the cases cited on the argument, or which have come to our notice, the distinction is, we think, maintained on the real weight of authority, confining this term to actual decisions and not *dicta*.

But inasmuch as it cannot be denied, there has been a vague idea, in many quarters, that there was something especially improper in disposing of undivided rights in parts of an inheritance, it will be of some importance, perhaps, to consider how far this notion has any legal foundations. And as the only expressed reason for the judicial statements referred to, is the prejudice done to the co-tenants, this must be taken into account in the outset. And we

are required to consider what is to be regarded as such a prejudice as will preclude the dispositions referred to.

It cannot be true that every act which has a tendency to interfere with the supposed interests of others is forbidden, merely because some such tendency may be imagined to exist. No rights of property can depend on the floating and unregulated opinions of courts or juries. No legal right can be cut off on any such pretense. Unless the law of the land has made an interest in land unassignable, no court, either of law or of equity, has any power to forbid it. Courts of equity cannot override the law any more than other courts. Every court must respect the rights lawfully obtained by transfer from tenants in common. And the original resort to equity is declared and settled in England to be a matter of absolute right, in every case where partition could be had at law, and in no other case, except as to equitable estates. It is the legal right which gives jurisdiction over the legal estate. *Baring v. Nash*, 1 V. & B. 551; *Parker v. Gerard*, Amb. 236; *Turner v. Morgan*, 8 Ves. 143.

It is held, also, that the right is so absolute that, although its enforcement would lead to the most absurd, oppressive, and ruinous results, the court was powerless to resist it. Equity had no inherent jurisdiction to order sales, and where the number of interests was large, or the parcel to be divided small, or difficult of division, the division must be made in spite of the difficulty or hardship. Equity can, no doubt, do justice as to many collateral rights and incidents, which could not be regulated under the writ of partition, and can deal with numerous interests and estates; but the jurisdiction, as before stated, is one which cannot be refused to any legal owner. And by the former English practice, the action of the commissioners could not be overruled by the court for inequality. *Manners v. Charlesworth*, 1 Myl. & K. 330; *Turner v. Morgan*, 8 Ves. 143, is an illustration of this. Partition was there sought of a house, complainant owning two-thirds, and defendant, who was in possession, owning one-third. The chancellor, seeing that a division would be ruinous, held the case over for some time that the parties might come to an agreement. But this failing, it was said that the rule was compulsory, and he reluctantly granted a decree. The result appears in a note to 11 Ves. 157, which is as follows: "The end of that case was, that, the commission having been executed, an exception was taken by the defendant, on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys,

Batler v. Roy.

etc., all the fire-places, the only staircase in the house, and all the conveniences in the yard. Upon the 1st of August, 1804, the exception was overruled. The lord chancellor said he did not know how to make a better partition for the parties; that he granted the commission with great reluctance, but was bound by authority; and it must be a strong case to induce the court to interpose; as the parties ought to agree to buy and sell." In *Parker v. Gerard*, Ambl. 236, where the interest of a party was so small he would have preferred relinquishing it, he was compelled to make partition, and, according to the rule then in force, to pay an equal share of the expense. There are some further cases collected in the notes to *Agar v. Fairfax*, 2 Lead. Cas. in Eq. 349, *et seq.*, and in the notes to *Mundy v. Mundy*, 1 Belt's Supp. 236, 237.

The difficulties which have occurred in practice have been very serious, and the mischief done by unlimited transfers and subdivisions of undivided interests has been quite as prejudicial as any dealing with interests in detached lots could be. The remedy hinted at by Lord ELDON, and by other chancellors, was resort to a sale. Our law has always permitted this when property was not divisible without mischief; and we have never had any such monstrous results as appeared in *Turner v. Morgan*. We are not informed whether this power existed when the law was settled in Massachusetts. It completely removes all the imaginary hardships there suggested. It may be said, indeed, that the tenants would prefer lands, and have a right to them. But this principle must be general, and apply as well to small as to large estates; and then the power to insist on a division is, as plainly stated by Lord MACCLESFIELD, in *Earl of Clarendon & Bligh v. Hornby*, 1 P. Wms. 447, a power to extort an exorbitant price from the party desiring the estate. The statute does not permit any such grasping and selfish policy, and, as all parties can bid, if they choose, they can always get the worth of the land, if not the land itself. The prejudice is now, at least, very difficult to be appreciated.

In England, the result of their old experience has been the passage, in 1868, of an act not only permitting a sale, in any case where it seems necessary, but absolutely requiring it in all cases where one-half in interest request it, unless the opposing parties will buy. And it has been allowed on behalf of infants and married women, as well as others. *Higgs v. Dorkis*, L. R., 13 Eq. 280; *France v. Franco*, id. 173. In *Pemberton v. Barnes*, L. R., 6 Chancery Appeals, 685,

decided in July, 1871, the lord chancellor applied this statute to a very great estate, including a first-class mansion and park of three hundred acres, farming lands of three thousand acres, and a manor extending over about thirty square miles. He makes some very sensible remarks upon the sentimental view of the question which seems to have been taken by the vice-chancellor, which are not inapplicable to such cases as this. "The vice-chancellor then urges, as a reason against a sale, that the two part-owners come from a common ancestor, and that the testator gave the estate to them as land. No doubt he gave it as land; but he gave to them absolutely, and there was nothing to prevent them from disposing of it as they thought fit. Consequently, I do not see that its coming from a common ancestor makes any great difference;" p. 694. We must look, then, to ascertain whether there is any such legal incapacity as is asserted, for in this equity only follows the law.

It would be of more antiquarian than practical interest to discuss at large the old English doctrines in regard to partitions and undivided estates. The decisions are consistent in denying any right to divide such estates, large or small, as involve single rents, services, or other elements of difficulty. Copy-holds and customary estates cannot be partitioned at all, even by courts, except, possibly, under the recent statutes of Victoria. Allnutt on Partition, 136. And there are many cases where nothing but the wide discretion of equity can enable a division to be made without great inconvenience.

But upon the question whether estates can be dealt with by parties separately, there is, we think, no absence of authority. The doctrine is not unknown.

In all the cases which have arisen, so far as we have been able to trace any thing on the subject, the dispute has been, not whether estates could be partitioned separately, but whether they must not always be partitioned so. And Judge STORY, in his chapter on partition (1 Eq. Jur., § 646 *et seq.*), shows it to be one of the chief advantages of equity over law, that it is not compelled to subdivide each parcel. At common law there could be no allowance made for owelty or equality of partition, except by agreement of the parties, and every parcel must be subdivided into as many payments as there were owners, unless they all happened to be of equal value, which could seldom happen. While no case has been discovered in any of the English law books, in any way questioning the right to deal separately with separate freeholds, the variations from that

practice are recorded usually with their reasons, and as deviations from custom. The doctrine that, on a partition of different estates, they may be allotted severally and without subdivisions, is traced back to an authority cited in Brooke's Abridgment, from the Year Books. The statutes of Henry VIII, which gave to tenants in common and joint tenants the rights of partition, merely extended to them the common-law writ, *de partitione facienda*, as it had always been given to coparceners, and made no change in its operation. The language (merely modernized in spelling) is, "in like manner and form, as coparceners by the common laws of this realm have been and are compellable to do, and the same writ to be pursued at the common law." Act 31 H. VIII, ch. 1. The authority in Brooke was a case of *quare impedit*, concerning the presentment of an advowson. A widow having dower in several tenements and manors, the sheriff, under a writ, assigned to her in entirety one manor and advowson. It was claimed she should have been endowed of a third of each, but two of the judges held against one, that the assignment was good. Littleton enlarged somewhat upon the matter, and gave illustrations.

He says: "If a man has two manors, and elegit is sued against him, the sheriff may deliver him one manor; and likewise in writ *de partitione facienda*, where there are two parceners and two manors, the sheriff may assign the one to one, and the other manor to the other; and likewise in dower of three acres, or three manors, he may assign one acre, or one manor to the wife, for the whole." Br. Abr. "Dower, 72" (12 Ed. IV). This same citation occurs in two other places, once under "Elegit, 14," and once under "Partition, 29," in both of which it is qualified by the condition that the manors shall be of equal values (*Tamen videtur quod hoc intelligitur ou ils sont de equal values, et eadem de ii acres*). This qualification is recognized throughout (Allnutt on Partition, 50; Viner's Ab., "Partition A, 4"), and is necessary, because under the writ of partition there was no provision for equalizing shares. On voluntary partitions this was frequently done by a rent charge on the larger, in aid of the smaller, tenement assigned, or by occupying the several manors in alternate years. Fitz-N. B. 62 K.; Litt., §§ 251, 252. Co. Litt. 165 a.

The writ was designed to compel refractory tenants into a partition, and in a majority of cases the division was made without a writ, by such means as seemed proper. The commonest methods

are mentioned by Littleton, §§ 243, 244, 245, *et seq.*, and taken from him with explanations by most of the writers on real estate. Co. Litt. 166, *a*; 2 Cr. Dig. 394, 395. This may account for the meagre information on the subject of enforced partition to be found in the books, complained of by the English as well as by the American courts. See remarks of the Chancellor in *Manners v. Charlesworth*, 1 Myl. & K. 330. Much of the discussion in the early writers is upon the validity of these voluntary partitions, which were sustained as far as possible.

Equality of value alone was not enough to maintain an allotment to each of two tenants in common of a separate estate in entirety. They must have been held by similar titles. If one was held in fee-simple, and one in fee-tail, there could be no such allotment, and each had to be subdivided, because a partition at common law did not bind future estates. Co. Litt. 173.

The statutes relating to writs of elegit did not in terms require the sheriff to give an undivided half of the debtor's lands, but simply a half in value, and, as usually interpreted, by metes and bounds. The practice seems generally, however, to have been to give only half of the several tenements extended, and the citation from Brooke refers to this. In *Den v. Lord Abingdon*, 2 Doug. 473, the question was raised whether the sheriff might not deliver so many separate tenements, without division, as would equal in value one-half of all the lands of the debtor, and it was held he could do so—Lord MANSFIELD remarking on the inconvenience of dividing a great number of parcels. It is said in a note, as well as in the argument, that there is some confusion as to what had been the construction of the statute. And it appears also that a division would be necessary, unless the half in value could be got at without it. But the whole course of reasoning is against incumbering more parcels than should be necessary by such a levy, and would apply to a levy on undivided estates as well as others. We find no English decisions directly touching such a case, but the Connecticut case of *Starr v. Leavitt*, before cited, is in point, and rests on the same principles.

The first case in equity which we have discovered, in which a partition was sought without dividing each of the estates, is *Earl of Clarendon and Bligh v. Hornby*, 1 P. Wms. 447, where the defendant insisted very strenuously that the common-law rule must be followed. Lord MACCOLEFIELD, however, held that it was in the power

Butler v. Roys.

of the court to allot entire parcels, and directed the commissioners to give the mansion and principal estate to the complainants, only assigning to Hornby lands to the full value of his one-third interest.

In *Bartlett v. Harlow*, mention is made of an early case, in Brownlow, 157, which it is admitted establishes the right of a tenant in common to sell his interest in any freehold; but it is intimated that he mentions no name nor date of the case in question, nor any other particulars, from which we might learn whether there was any thing peculiar in the circumstances, or whether the point now in question was considered by the court; and they proceed to say that a single case, thus loosely reported, is entitled to very little consideration, when it appears to be in any degree inconsistent with the general principles of the law applicable to the subject. As the only case cited in opposition, which has any bearing on the subject, is *Porter v. Hill*, the criticism is somewhat peculiar, and, so far as it relates to accuracy of statement, it is entirely unfounded. The case is stated very minutely, and the exact point decided is so plain that no one could mistake it. It is taken from Viner's Abridgment, "Partition S," 15, and appears in that work as undisputed law; and it is so laid down in the modern work of Mr. Allnatt, who cites the case in three different places. Allnatt on Partition, 37, 60, 61. The statement is as follows:

"Thirteen men joined in a purchase of a manor, the conveyance was of a moiety to one of them in fee, and the other moiety to the other twelve in fee. The twelve made a feoffment to J. S. of twelve several tenements and lands, and J. S. made twelve several feoffments to those twelve; now the thirteenth man, who had the other moiety, brought one writ of partition against them all, pretending that they held *insimul et pro indiviso*; and by the opinion of the whole court it would not lie, but he ought to have brought several writs."

It is not strange, perhaps, that the common-law rules should be unfamiliar, for even in England a question was raised but a few years ago, in *Hanbury v. Hussey*, 5 Eng. L. & Eq. 81, whether a manor could be divided at all.

In *Rutherford v. Jones*, 14 Geo. 521, a bill in equity was filed as the only supposed means of obtaining a partition without dividing every parcel held in common, and the court seem to have accepted the doctrine as true at common law, but said there was a statute passed at a very early day in that State, during the last century,

which allowed entire lots to be set off at law; and on that account the bill was dismissed, and the party remanded to his writ. In Georgia the remedy in equity appears to have been confined to cases not cognizable at law.

So the House of Lords, in *Menzies v. Macdonald*, 36 Eng. L. & Eq. 20, dealt with a case where a land-holder, having a common interest in a lake bordering his estate, disposed of a part of his lands, and, as appurtenant thereto, of a part interest in the lake, to be used in common with the other owners, who claimed no such partial interest in common could be conveyed. But on general principles, and without any suggestion of difference between English and Scottish law on the subject, it was held there could be no objection to it. The case is not directly in point, and is not authority, but its language is significant.

Judge STORY, in his commentaries, lays down the doctrine that, while at law it is possible that in some cases whole estates may be allotted without division, yet "it is obvious that, at law, such a partition can rarely be conveniently made, because the court cannot decree compensation, so as to make up for any inequality, which must ordinarily occur in the allotment of different estates to each party." 1 Story's Eq. Jur., § 657. In the preceding section (§ 656, c) it is stated that "courts of equity, in making these adjustments, will not confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate, which have been derived from any of the original tenants in common; and will, if necessary for this purpose, direct a distinct partition of each of the several portions of the estate, in which the derivative alienees have a distinct interest, in order to protect that interest." The case referred to as an illustration is *Story v. Johnson*, 1 Y. & Coll. Exch. 538, 2 id. 586, where one of three tenants in common holding each an undivided third interest in two estates, conveyed his interest in one estate to one grantee, and in the other estate to another grantee, and the court compelled both estates to be divided, each into three parts, so that each of those grantees should enjoy his title.

So in *Brace v. Foulkes*, 13 Eng. L. & Eq. 297, a tenant in common was allowed to file a claim for partition of a specific part of certain property, having no interest in the remainder, although a bill was already pending for a partition of

Butler v. Roys.

the whole, which had not yet been brought to a hearing; and the vice-chancellor not only entertained it, but refused to compel the complainant to await the proceedings in the suit for the entire estate.

The courts, then, do not hesitate to recognize the right to make such sales.

Not only is our law regulating partitions based on the idea that a sale, instead of being a calamity to be avoided at all hazards, will always be more just than an unequal partition, but it must be construed with reference to other laws. Lands have no such fixed rental value here as in England, and when a creditor has claims, we require a sale instead of the ancient extent. If a creditor, no matter what may be the size of his debt, is compelled to levy on an undivided interest in a whole inheritance, he must in cases like the present, where the value amounts to millions of dollars, either make an excessive levy, or take an infinitesimal share in some hundreds of parcels. It is easy enough to see that property would not bring its value on such a sale, and that the procedure would not tend to simplify partitions, while it would almost inevitably lead to fraud and collusion against the purchaser, in settling the terms of partition, by decree or by agreement.

If lands have been treated as separate parcels for one purpose there is no sense in holding them inseparable for another. The presumption must always be that lots which are purchased by separate deeds, or described in plats as separate, may be safely treated as continuing separate, unless so rented or occupied, or otherwise charged, as to render it improper thus to regard them. The law may do, safely and justly, what the parties do themselves, whatever may be the size of the freehold.

This has been the common practice of the country; and, whatever may have been our undefined notions on the subject, they have seldom prevented lawyers or laymen from dealing with interests in city lots, or other distinct parcels, without inquiring whether they are held in common with other detached lands. Our tax laws have always been framed on this plan, and the practice has not been found dangerous. But with the policy, whether good or bad, we have no concern, when parties rest on legal rights. We think the right of sale exists in each distinct freehold, and cannot be divested by legal discretion.

Cases are constantly arising where estates once separate become

united into one holding, and when so united they may cease to be distinct freeholds. Where various adjacent lots are leased together for a rent, or subject to a burden, incapable of apportionment on any recognized basis for each lot, or where a hotel or other single building covers several lots, or where they are used together for a mill or factory, or other enterprise, or where various parcels are consolidated into one farm or made subservient to it, and so used, there can be no difficulty in determining by the terms of the charge, or by the possession itself, their unity of occupation; and a purchaser with that notice buys at his peril. Such cases are easily recognized, and will be readily dealt with on their own facts and merits. If an estate is really single, it will be protected against any acts in prejudice of the owners. And, on the same principle, as held in the case from Missouri, if parties subdivide an entire estate into distinct and separate parcels, with the plain design of treating them as separate, it can make no difference that the separate holdings were once united, or that the divisions are not extensive.

The execution purchasers of the interests of Theodore Campau took valid legal estates, and have a right to enforce them at law, as well as in equity. They are not bound by the partition proceedings, because they were not made parties. If Theodore Campau, by the disregard of these sales, received on the partition a larger share than he was entitled to, that must be arranged between him and those who lose interests in the parcels sold on execution. The case of *Dacre v. Gorges*, 2 S. & S. 454, indicates how such compensation is secured under the English practice; but as no such interference is necessary to protect the purchasers on execution, we are not called upon in this case to consider what the proper method may be.

The judgment in each of the causes brought up must be reversed, with costs, and a new trial granted.

The Flint and Fentonville Plank-road Co. v. Woodhull.

THE FLINT AND FENTONVILLE PLANK-ROAD COMPANY V.
WOODHULL.

(25 Mich. 99.)

Corporation — violation of charter — question as to, judicial.

The charter of a corporation contained a provision that it should not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act." *Held*, that such violation must be made to appear by the judgment of a court, and could not be adjudged by the legislature.

THE case is fully stated in the opinion.

O. F. Wisner and G. V. N. Lothrop, for plaintiff in error.

M. E. Crofoot and C. I. Walker, for defendant in error.

COOLEY, J. The legislature of 1848 passed an act incorporating the Flint & Fentonville Plank-road Company, with power to lay out, establish and construct a plank-road, and all necessary buildings, from the village of Flint to the village of Fentonville. The act was to remain in force for sixty years from and after its passage, but the fourth section provided that "the legislature may at any time alter, amend, or repeal this act, by a vote of two-thirds of each branch thereof; but such alteration, amendment, or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act." The fifth section made the general plank-road act of 1848 a part of this special charter. Laws 1848, p. 404.

The corporators appear to have organized under their charter, and to have constructed the road provided for by it, a part of which they now keep up and maintain. In 1871, the legislature passed an act to repeal this charter. This act is very brief, has no preamble, contains no recitals, and simply declares that the act first above named "be and the same is hereby repealed." Sess. L. 1871, vol. 3, p. 167. No notice was given to the company or to any of its officers, of the intention to adopt or to propose any such repeal, or to

The Flint and Fentonville Plank-road Co. v. Woodhull.

enter upon any investigation of a violation by the company of any of the provisions of its charter; neither the journals of the legislature, nor the files or records in the office of the secretary of State, show that any such investigation was ever had, nor is it claimed or suggested that there is evidence anywhere that any tribunal, legislative or judicial, has passed upon the question of such a violation, and adjudged it to have taken place, unless the repealing act itself affords such evidence. The company denies the validity of this act, and the defendant, having treated it as valid, and acted upon it adversely to their interests, an issue has been made, which is now before us for decision.

It is not disputed, on the part of the defendant, that the charter of a private corporation is to be regarded as a contract, whose provisions are binding upon the State, and cannot be set aside at the will of the legislature. Such a charter is a law, but it is also something more than a law, in that it contains stipulations which are terms of compact between the State as the one party, and the corporators as the other, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as would be the contracts of private parties. But the defendant insists that the repealing act in this case is one contemplated and justified by the contract itself; and no attempt is made to defend it, except upon what the defendant regards as a just construction of the original charter. The positions taken by the defendant may be succinctly stated as follows:

1. The legislature had a right to repeal the charter whenever the fact should be made to appear that a violation of the charter had taken place.

2. The inquiry into the fact of violation would be an inquiry for the purpose of enabling the legislature to exercise its legitimate powers, and would, therefore, be legislative in character, and might be entered upon in any manner and through any channels the legislative wisdom might devise or see fit to employ, untrammelled by any of the rules which govern the action of judicial tribunals.

3. The repealing act is not only of itself a determination that the violation of charter has taken place, but it is evidence, also, that the legislature has first informed itself of the facts; and no court or other authority is at liberty to assume that it has acted improvidently or without due inquiry.

4. But, although all presumptions favor the legislative action, it

The Flint and Fentonville Plank-road Co. v. Woodhull.

is conceded that the parties concerned are entitled to a judicial investigation afterward, and upon an issue properly framed for that purpose, may show the act invalid by establishing the fact that no violation of the charter has taken place, and that the legislature must have acted under mistake or in misapprehension of the facts.

The first of these positions must be conceded. The right of the legislature to repeal, when it was properly made to appear that a breach of the charter had taken place, cannot be questioned.

The second will be equally indisputable, if the main point be established, that the inquiry to determine the violation of the charter is legislative in character. The legislature will not only choose its own modes of collecting information to guide its legislative discretion, but from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results. And if the records show no investigation, we must still presume the proper information was obtained; for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority. *Baltimore v. State*, 15 Md. 376; *Lusher v. Scites*, 4 W. Va. 11; *People v. Draper*, 15 N. Y. 545, 555; *Wright v. Defrees*, 8 Ind. 302; *Ex parte McCardle*, 7 Wall. 514; *Bradshaw v. Omaha*, 1 Neb. 16; *Humboldt Co. v. Churchill Co. Comm'rs*, 6 Nev. 30.

The third point must also be conceded to this extent: that a legislative act, not violative of any constitutional principle, must be its own sufficient and conclusive evidence, when assailed, of the justice, propriety, and policy of its passage. We ourselves acted upon this principle, in *People v. Mahaney*, 13 Mich. 484, and it is not disputed anywhere so far as we are aware.

But there lies at the basis of all these propositions the question whether the determination that the charter has been violated, is in truth legislative in character. The defendant affirms that it is; the plaintiff insists that it is properly and essentially judicial. This point decided one way, disposes of the case; decided the other, it is followed by others of a difficult and somewhat delicate nature, which would necessarily be considered before a conclusion could be reached on the merits.

Now it must be conceded that, if the act in question is not judicial in character, it is at least strikingly analogous. There is a

The Flint and Fentonville Plank-road Co. v. Woodhull.

question which is or may be disputed, there are adverse parties, there are private interests involved, there is evidence to be received, there is the fact to be found, there is punishment to be inflicted, there is a forfeiture to be enforced. Legislative action does not often, to say the least, include all, or many, of these elements. It may affect private rights incidentally, but it does not often proceed to pass directly upon the controversies between the State and individuals. In some cases the legislature has judicial power, because it is incident and essential to the discharge of legislative functions. Such is its power to determine upon the election and qualification of its members, and the power to punish for contempts of its authority. In these cases it is entitled to all the presumptions which support the action of courts, and having no authority set over it, to review its determinations, they must be accepted everywhere as correct and conclusive. *People v. Mahaney*, 13 Mich. 481; *Anderson v. Dunn*, 6 Wheat. 204; *Hiss v. Bartlett*, 3 Gray, 468; *Burnham v. Morrissey*, 14 id. 226; *State v. Matthews*, 37 N. H. 450; *State v. Jarrett*, 17 Md. 309; *Lamb v. Lynd*, 44 Penn. St. 336. But every judgment must have something preceding it to put the judicial body in motion; the sentence, by any authority pronounced, however angust or powerful, will be a mere idle fulmination, if there was no *lis mota* to base it upon. The order of a legislative body for the punishment of an individual would be merely idle and void, unless somewhere in the record there appeared a cause alleged which subjected him to its jurisdiction for such punishment.

It is conceded in the present case that the fact of corporate abuse was to be found before the charter could be taken away. The repealing act, however, is only a sentence. It inflicts the penalty of corporate death, without in any way declaring or intimating, except by the penalty, that the corporation has been found worthy of death. It is precisely such an act as might have been passed had the legislative power been unlimited and untrammelled. The legislature had power to repeal for cause, and was prohibited from repealing without cause; it repeals, expressing no cause, and it is said the cause must be inferred. Then comes what is to have the effect of a punishment, though it does not purport to be such, and only on its face appears to be the withdrawal of a privilege; and yet, as there was a right assured and no mere privilege to be withdrawn, it is supposed we must infer, *first*, that a punishment was designed, and then, from the punishment infer the guilt, the accusation, the trial, and

The Flint and Fentonville Plank-road Co. v. Woodhull.

the conviction. Having thus assumed the conclusion to begin with, we must next, from the conclusion, assume that the premises existed to deduce it from. This is certainly much more than can be assumed in support of the action of any court. In the courts, there must at least be an accusation and a condemnation, before there can be the infliction of any penalty. To infer cause where none is assigned, in the taking away of private rights, is to take up and adopt the arguments in favor of the arbitrary arrests under the command of Charles I. His warrants assigned no cause, and, therefore, it was argued, sufficient cause must be presumed. If this repealing act is good as a judgment of abuse of corporate privileges, then Sir NICHOLAS HYDE was correct in holding that he could not release on *habeas corpus* the parties committed to prison by the special command of the king for refusing to submit to his illegal exactions. The king had power to order a committal for cause; no cause was expressed; therefore a sufficient cause was to be assumed. *Darnel's case*, 3 State Trials, 1; Broom's Const. L. 162.

The defendant refers to certain cases in support of his positions, of which *The Miner's Bank v. The United States*, Morris, 482; S. C., 1 Greene (Iowa), 553, goes to the full extent of holding that such a legislative act is not only valid, but is conclusive that cause existed for its passage. This case, however, stands alone, and was not very much insisted upon, on the argument. The cases of *Crease v. Babcock*, 23 Pick. 334, and *Erie & N. E. R. R. Co. v. Casey*, 26 Penn. St. 287, are more relied upon as laying down the correct rule. The Pennsylvania case is most directly in point, and as it appears to have been carefully considered, the conclusion is entitled to great respect, notwithstanding those eminent jurists, Mr. Chief Justice LEWIS and Mr. Justice WOODWARD, dissented. In that case the corporation was protected by a clause in its charter similar to the one under consideration here, and the legislature had thought proper to act upon it by repealing the charter, without any preliminary judicial investigation. In stating the position assumed in support of the repealing act, Mr. Justice BLACK says: "For the defendant, it is insisted that the repealing act is itself not only evidence, but conclusive evidence, that the company had previously committed some abuse or misuse which justified the repeal. No case has been cited which denies this doctrine in terms; and it was held for the true rule by the supreme courts of Iowa (1 Greene, 561) and of New York (19 Barb. 81). But I do not see clearly the

The Flint and Fentonville Plank-road Co. v. Woodhull.

principle on which it can stand. A legislative body in a matter like this is known to proceed without formal notice, without specific accusation, and without opportunity to answer. There is no confronting of the parties with the witnesses, nor any thing that can be called a hearing or trial. It would, therefore, seem unjust to hold that a legislative act is, like a judicial sentence, conclusive of every fact which ought to have been found before it was passed. It might more plausibly be likened to an award made by an umpire to whom both parties have agreed that the subject should be referred." "For myself," he says, "I incline to the opinion that, when the constitutional power of the legislature to pass a law depends on matter of fact, the party to be affected by it ought to have an opportunity afterward of showing how the fact is." *E. & N. E. R. R. Co. v. Casey*, 26 Penn. St. 316.

Having thus expressed the opinion that legislative conclusions on questions of fact were subject to review in the courts, the learned judge goes further, and proceeds to lay down rules for the legislative guidance in determining the causes which are to justify the legislature in acting at all. The legislature is not to judge finally for itself what is abuse or misuse of corporate privileges by a company; but,

1. The illegal act must be *positive*. A mere omission, like the failure of a bank to make its annual returns, is not enough.

2. A disregard of the charter, which is injurious only to *private* interests, and which, therefore, admits of *private* compensation, is not, he thinks, within the fair meaning of the words. It must be some conduct which infringes upon a right reserved by a State for the benefit of the public.

3. It must be *willful*; that is, not involuntary, accidental or the consequence of mere mistake of fact.

4. It must not be the mere transgression of the act of incorporation by a subordinate officer, or agent without authority, express or implied, from the board of directors. *Id.* 319.

Thus the majority of the supreme court of Pennsylvania lays down the rules of law which are to control the legislature in the exercise of its legislative authority, and at the same time declares the right of the court to review the conclusions of the legislative body in matters of fact. With great respect for that eminent tribunal, we are unable to understand why this is not a setting of the court above the legislature, as an appellate tribunal in matters both

The Flint and Fentonville Plank-road Co. v. Woodhull.

of law and of fact, in a manner which wholly ignores the division of powers in the constitution, and is quite inconsistent with the harmonious operation of the machinery of government. It is not consistent with legislative independence and dignity, that the courts should assert a right to sit in judgment upon legislative action, or to attribute to the legislature erroneous or oppressive conduct in the exercise of any of its proper and legitimate functions. These two departments of the government being co-ordinate, and neither of them occupying a position subordinate to the other, the conclusions of each must be accepted by the other as proceeding from good motives, and as warranted by the proper information. It could only be productive of endless discord and confusion, not to say of jealousies and conflicts of authority, if the legislature was to review and set aside the judgments of the courts, or the courts to allow parties to appeal to them from the conclusions the legislature had reached, in determining upon the propriety of passing or declining to pass a proposed law. Careful endeavor has been made to prevent any such jealousies and conflicts when, in framing our constitutions, a line of distinction has been drawn between legislative and judicial functions, and the departments to which these functions respectively have been confided have been intrusted with no power to pass that line. It is, therefore, in the highest degree impertinent and obtrusive, when either department undertakes to advise the other, that in the exercise of its proper functions it has acted unwisely and indiscreetly; has misjudged the facts or perverted the law; and its action must be still more offensive, if it entertains the appeal of parties from the decisions of the other, when acting within a province which was set apart to be peculiarly under its jurisdiction and control.

Moreover, there is in the nature of the case, and the difference in the manner in which legislative and judicial functions are performed, reason sufficient to demonstrate the impossibility of a proper review by the one department of the decisions the other has made. Legislators have a right to act upon their own knowledge and observation, upon hearsay, upon information derived from the public press, upon the *ex parte* petitions of interested parties, upon any thing, in short, which satisfies their judgment; and public opinion is one of the most important facts to be considered in determining upon the propriety or advisability of a proposed law. Even an unreasonable prejudice, if general or wide-spread, may sometimes

The Flint and Fentonville Plank-road Co. v. Woodhall.

very properly be a controlling consideration when the case is such that to the enforcement of the law a strong supporting public sentiment would be a necessity. But these are things the courts must not allow to influence their action. With them the question must be simply, *first*, what is the law; and *second*, what are the facts; and the facts they must reach through inflexible rules of evidence laid down for their guidance. A review of a legislative determination by the courts would, therefore, not only be highly indecorous and objectionable for the reasons already stated, but it would be eminently improper also, for the further reason, that it could not possibly be had upon the same evidence. It is wholly foreign to any proper administration of law or justice, that the decision of the proper authority upon any subject should be liable to review by another tribunal, which in such review is shut off from the sources of information to which the other had access. So far, therefore, from the different ways the legislature and the judiciary have of reaching the facts being a reason why the latter should give parties who have been decided against by the former a rehearing, they constitute with us a very conclusive reason for holding that those cases in which there is a hearing to be had on questions of private right and private property, are, and must in their very nature be, regarded as exclusively of judicial cognizance.

But there are still further reasons why the doctrine declared in the Pennsylvania case cannot, we think, be sound. That doctrine is—to state it more fully—that, though the legislature may repeal the corporate charter, on the ground of abuse or misuse, thereby taking away from the corporators the franchise of greater or less property value, yet the legislative decision is only *prima facie* correct, and the parties are entitled to have it set aside in the courts afterward, on showing by evidence that they have not been guilty of such abuse or misuse. In other words the legislative act, which may perhaps be passed without any notice, is to stand as a conviction of guilt until the parties charged can prove their innocence. But their innocence of what? In other cases it would be thought the grossest perversion of right and justice if, in any proceeding in court, the party was to be presumed guilty of any one specific charge until he proved himself innocent; but that case would be a much less serious departure from the rules of justice than this. The general plank-road act of 1848 was made a part of this company's charter, and it contained a great many provisions to be observed by

The Flint and Fentonville Plank-road Co. v. Woodhull.

it, and for a violation of some of them, specific penalties were imposed. The company has been in operation upward of twenty years, when its franchise is taken away on a presumption of guilt, which is only to be removed by the corporators proving that in all that time they have observed every provision of their charter, and been guilty of no default. It is safe to say that what is required of them is, and would be in any such case, a simple impossibility. It is as if an individual should be charged generally, and without further specification, with an offense against the criminal laws, and the trial-court should say to him: "You are charged, and *prima facie* convicted, of crime, but you shall be relieved of the conviction on making proof that you have never disobeyed the law. Meantime, and until you do so, the State will take from you your property, in punishment for your presumed guilt."

Now it is simply impossible that any doctrine which leads to such results can be sound. But the illustrations of its anomalous and unjust character might be multiplied indefinitely; and if it were possible for the question of corporate default to be fairly tried under it, it must be remembered, also, that as the question would or might arise between individuals and the company, as it has in this instance, there might be repeated trials of the same question, none of which would be conclusive in a new suit. The question involved in each suit would be the validity of a statute, dependent upon the facts, and therefore to be submitted to a jury; and while the jury in one cause might hold it valid, another in a different case, acting upon somewhat different evidence, or influenced by more persuasive advocates, might declare it void; and thus it would be a law to-day as to one party, and no law to-morrow as to another; and so on indefinitely, according to the varying views which different panels of jurymen might take of disputed facts; until, perhaps, the State would be compelled to interfere by *quo warranto*, and have, after all these proceedings, the authoritative adjudication which sound policy, not less than correct principle, demanded at the beginning. But we need hardly say that a law, if valid at all, must be valid from its enactment, and cannot be made to depend upon the opinion of a jury as to the sufficiency of the reasons for its being passed.

We are constrained, therefore, from all these considerations, to say that the determination whether a corporation has violated its charter is judicial in its nature. It requires the action of those tribunals which must hear before they condemn, and must proceed

The Flint and Fentonville Plank-road Co. v. Woodhull.

upon inquiry. If it were properly legislative, it may be that the legislature must be presumed to have given a hearing; but the fact, as we have seen, in this case, is otherwise, and the cases in which presumptions are to be indulged against the facts ought not to be multiplied. It is sufficient to say that, in our opinion, the case is one in which the party is entitled to a trial of right *in fact*, and cannot be put off with one which rests exclusively in a presumption of law, indulged against the fact. The violation of the charter cannot be legally made to appear, except on trial in a tribunal whose course of proceeding is devised for the determination of questions of this nature.

We think this the fair construction of that clause of the charter which is in question. It is not to be presumed that the legislature designed to take upon itself judicial powers; and as the act does not necessarily require that construction, it should not be given it. We must suppose that an inquiry in some proper form was contemplated, by means of which and on fair trial it should be made to appear to the legislature that a cause existed justifying repeal. Any other view renders the stipulation worthless as a protection; but this view protects the interests of corporators, and at the same time enables the legislature to exercise its power of taking away the charter even though the violation of corporate duty might not be of that serious character which would seem to justify declaring a forfeiture on judicial proceedings instituted, independent of this clause. The repealing act, it must be assumed, was passed through inadvertence, and probably under the impression that the charter, like many others in this State, was subject to repeal in the legislative discretion.

This being our view, it follows that the judgment of the circuit court must be reversed, with costs, and a new trial granted.

CHRISTIANCY, Ch. J., and CAMPBELL, J., concurred.

GRAVES, J., did not sit in this case.

Thompson v. Waters.

THOMPSON V. WATERS.

(35 Mich. 214.)

Corporation — power to purchase lands out of State.

A corporation, chartered in Indiana, *held* to have power to purchase and hold lands in Michigan without any statute of the latter State affirmatively authorizing it. (CAMPBELL, J., dissenting.)

EJECTMENT by J. Edgar Thompson against Ira Waters. The opinion states the case.

H. H. Riley and R. Brackenridge, for plaintiff in error.

Shipman & Loveridge, for defendant in error.

CHRISTIANCY, C. J. This was an action of ejectment brought by the plaintiff in error against the defendant in error in the circuit court for the county of St. Joseph, to recover the north half of the south half of section 24, township 7 south, of range 11 west, situated in said county of St. Joseph.

Both parties claimed title through J. Eastman Johnson, who owned the land previous to the deeds stated below.

The plaintiff's claim of title was this: On the 20th of July, 1853, Johnson, by warranty deed, conveyed the land to the Fort Wayne & Chicago Railroad Company, a company incorporated under the laws of Indiana. By several acts passed by the legislatures of the States of Pennsylvania, Ohio, Indiana, and Illinois, authorizing the consolidation of railroad companies, and by the articles of consolidation of the 6th of May, 1856, consolidating the Ohio & Penn. R. R. Company, the Ohio & Indiana Railroad Company, and this Fort Wayne & Chicago Railroad Company, under the name of "The Pittsburgh, Fort Wayne & Chicago Railroad Company," all the powers, rights and franchises of said several companies so consolidated, passed to, and became vested in, the said Pittsburgh, Fort Wayne & Chicago Railroad Company. This consolidated company, on the 1st day of December, 1856, executed to Hugh McCullough, as trustee, a mortgage upon this and other

lands and property. And the said Pittsburgh, Fort Wayne & Chicago Railroad Company, and McCullough, the mortgagee, by their several deeds, dated respectively October 17 and October 24, 1860, conveyed the land in question to the plaintiff. All the foregoing were duly recorded in the office of the register of deeds for St. Joseph county prior to the execution of the deed from Johnson to Merrick, mentioned below.

The defendant claimed title under the following conveyances:

1. A quit-claim deed from J. Eastman Johnson to Benajah G. Merrick, dated November 29, 1860; and

2. A quit-claim deed from Merrick to defendant, dated November 30, 1866; both of which deeds are duly recorded. The lands lie at least fifty miles from any part of the railroad in question.

The court charged the jury at the request of the defendant "that the Fort Wayne & Chicago Railroad Company, at the time of the execution of the conveyance from Johnson to it, had no power to purchase and hold the lands in question in this State," and "that the jury will find for the defendant."

This raises the only question in the case which needs to be noticed, was the Fort Wayne & Chicago Railroad Company, being a corporation created by, and existing under, the laws of the State of Indiana, competent to take the title to this land in this State, under the deed executed to it by Johnson?

This question depends, first, upon the laws of Indiana; and, second, upon the laws of this State, and the public policy indicated by its legislation.

1st. As it was an artificial being, created only by the laws of Indiana, and by them alone endowed with whatever powers and capacities it possesses, it could have no capacities nor exercise any powers anywhere, which were not, expressly or by implication, given by those laws; or, in other words, no powers or capacities which would not be recognized and sustained by the courts of that State had the same question of capacity to take these lands come before them for adjudication.

The Fort Wayne & Chicago Railroad Company, to whom this land was conveyed, was organized under the general railroad law of that State, entitled "An act to provide for the incorporation of railroad companies," approved May 11, 1852. Most of the provisions of this act, in reference to the powers of companies to take lands, confine

Thompson v. Waters.

the power to such as the necessities of the company require, in exercising its franchises of building and maintaining the road.

The second subdivision, however, of the thirteenth section, gives power to "receive, hold and take such voluntary grants and donations of real estate and personal property as shall be made to it, *to aid in the construction, maintenance and accommodation of such railroad*"; but the real estate thus received, by voluntary grants, shall be held and used for the purpose of such grants only. It might admit of a question whether, under this provision, there was not power to acquire lands to be converted into money for the use of the company; but the question is quite immaterial, since the act of the legislature of the State of Indiana, of January 20, 1852,—which, if it did not take effect at an earlier date, took effect at least with the Revised Statutes of that State, of which it is a part (chap. 184), on the 6th of May, 1853 (*Jones v. Cavins*, 4 Ind. 305; *Ledley v. The State*, id. 580; *State v. Kiger*, id. 621), gives power (§ 2) to any railroad company which, then or thereafter, might be incorporated, by the consent of the directors of the same, "to receive the subscription for the capital stock of said companies, under such regulations and restrictions as their boards of directors may prescribe, any lands, town lots, real estate, or other description of property, as may be offered for that purpose: *Provided, however*, That the same shall be sold, except so much as may be necessary for the use of said road, or for the purposes aforesaid" (referring to certain provisions in the first section, in reference to lands taken on subscription of stock, or purchase for depots, turnouts, workshops, warehouses, etc.), "within a reasonable time, and the proceeds applied for the construction of said roads, or their appurtenances." That under this act the courts of Indiana would hold that these lands, though out of the State, might have been received for stock of the company, is sufficiently apparent from the decision in *Cincinnati, Union & Fort Wayne R. R. Co. v. Pearce*, 28 Ind. 502, in which it was held that lands situated in the State of Ohio, conveyed to an Indiana corporation, under authority of this act, constituted a valid consideration for a contract on the part of the company to issue stock for the amount.

And I see no reason to doubt that the courts of that State would recognize the right of the company to take lands in another State, in payment of a debt due the company, accruing in the legitimate prosecution of its business, and which would, therefore, be repre-

sented by the stock of the company. Indeed, independent of this act of January 20, 1852, I see no reason why the courts of that State should not recognize the right of the company to take such lands in payment of a debt so accruing, though they might not allow them to take the funds of the company to invest in another State. The main objection to allowing corporations, in the State of their creation, to hold lands not occupied and used in, or necessary to, the exercise of their franchises, is based upon the idea that it might be prejudicial to the public interest of that State, to allow corporations to become speculators in lands, or to hold them in large amounts, keeping them out of market for an unreasonable time, and preventing improvement, etc.; but this objection could not well be urged in the State of their creation, against their holding lands in *other* States, taken in payments of debts justly due them, accruing in the course of their legitimate business. The State in which the land lies might, if it chose, object; but the State of their creation could not be interested in raising such objection; but so far as it was interested at all, it would seem to be in favor of sustaining the right; for, unless the creation and prosperous continuance of such corporations were supposed to be objects of public interest, which deserved to be fostered, it is not likely the State would have authorized their creation. The courts and public authorities of such State may, therefore, be presumed to look with favor upon such facilities afforded to their corporations for collecting the debts due them in other States. And if the case were reversed, and one of our corporations should take lands in the State of Indiana, in payment of a debt due them there, we should, without hesitation, say, "If Indiana makes no objection to this, we do not see how any public interest of Michigan, or its people, can be promoted by our refusing to allow the corporation to avail itself of the facility thus afforded for the collection of its debts."

We may, therefore, safely assume that the courts of Indiana would not refuse to recognize the right of this company to take lands in this State, in payment or security for debts due to it here.

But these considerations only go to show that the laws of Indiana present no obstacle to the taking or holding of these lands by the company; in other words, they show that, by the laws of Indiana, so far as the question depends upon them, this company was competent to take this land in this State.

But the laws of Indiana have no force or operation (as laws,

giving powers, or creating or enforcing obligation) within the State of Michigan. No State has the power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises, in other States. It may confer powers, in the nature of a commission, to be exercised anywhere, upon condition that their exercise be assented to by the State or sovereignty where their exercise is sought; but without this assent, express or implied, such powers would be nugatory outside of the State granting them. Each State, by its own legislature, must determine for itself all such questions of public policy arising within its limits.

But, upon the principle of comity, which is a part of the voluntary law of nations, recognized, to a greater or less extent, by all civilized governments, effect is frequently given in one State or country to the laws of another, in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with, or depending upon, such foreign laws, without which commercial and business intercourse between the people of different States and countries could scarcely exist.

And among the States composing the federal union — whose relations and intercourse are much more intimate than those of foreign States (properly so called), and the interests of whose citizens are so intermingled that, in commercial and business enterprises, State lines are scarcely more regarded by the people than county and township lines — it is the common interest of all to encourage the recognition of those principles of State comity which tend to make us, in feeling and in interest, one homogeneous people, without limiting the independence of any States, and reserving to the people of each the sole right of regulating their own internal affairs, and of determining, at any time, through their legislation, what limits to the recognition of the laws of other States, public policy or the welfare of the people may require to be imposed. Such has been the general course and tendency of the judicial decisions in the several States.

Upon scarcely any subject has this comity been more generally admitted and administered than in reference to corporate rights and interests.

The rights which they have generally been allowed to enjoy, and the powers they have been allowed to exercise, in States other than that of their creation or domicile, have varied considerably, according to the nature and objects of the different corporations, and the cor-

responding differences in the mode of doing their corporate business. An insurance company in doing its business in another State, owing to the nature of the business itself (making contracts of insurance), would seem to be exercising through agents, its corporate franchises, in the same way as in the State of its creation, with the exception of corporation meetings and the strictly official action of its officers; and for this, as well as the prudential reason of protecting their citizens from imposition, and, perhaps, encouraging home companies, other States have quite generally required their compliance with certain rules and regulations fixed by the legislature, as conditions, upon which alone they are allowed to do their business within such State. Such has been the case in reference to insurance companies in our own State; and somewhat similar regulations have sometimes been adopted in some States, with reference to a few other corporations. But there are many other corporations whose business is, in its nature, more of a local character, confined mainly within the State of its creation, and only incidentally making contracts or acquiring property in other States, in the course of carrying on their home business, and in such cases the legislatures of the latter have seldom interfered, or placed them under any restriction. And the rule seems to be generally and well settled that the corporate existence, rights of making and enforcing contracts, of acquiring property and transacting business (not requiring the exercise of official corporate action or franchises within the State) of a corporation created by the laws of one State will be recognized and protected in another; subject only to the qualification, that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the State in which they are sought to be enjoyed or exercised, or prejudicial to the interests of such State or its citizens. With these limitations the rights above mentioned, of a corporation created in one State, are as clearly recognized and as generally enforced in another, as the individual rights of an inhabitant of one State are recognized and enforced in another, of which he is a non-resident; though such corporations cannot, of course, claim in another State, such recognition of corporate existence or rights, as a *citizen* of the State of its domicile, under the clause of the constitution which secures to the citizens of each State "all the privileges and immunities of citizens in the several States," as this would impair the independence of the several States, by depriving them of

the right to regulate their own internal affairs, according to their own interests, and ideas of State policy.

A corporation, however, in any aspect in which it is here essential to consider it, is but an artificial person, whose strictly legal existence, by force of obligatory law, is confined to the State which has created it and endowed it with its powers, capacities and rights; and it can only exercise those powers, capacities and rights in another State by the permission, express or implied, of the sovereign or legislative power of the latter, which must be its own judge how far, and upon what conditions, it is consistent with its own domestic policy, and the interest of its citizens, to accord such recognition. The mere right of a corporation to purchase and sell property not being in its nature strictly a franchise, but a right existing equally in individuals without special grant, is very generally recognized in States other than those of its creation.

And, as well observed by Judge STORY, in reference to questions of this kind (Conflict of Laws, §§ 35 and 37), fully approved by the supreme court of the United States, in *Bank of Augusta v. Earle*, 13 Pet. 589: "In the silence of any positive rule affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation" (or State) "which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided." See also *Runyan v. Coster's Lessee*, 14 Pet. 122; *Bard v. Poole*, 12 N. Y. 495; and *Merri-
rick v. Van Santvoord*, 34 id. 208.

As it is not, then, the comity of the courts, but that of the State, and the question is upon the adoption or qualified adoption in this State, of the laws, or rather certain incidents growing out of the laws of Indiana, it follows that the power of determining the question whether and how far, or with what modification, or upon what conditions, the laws of that State, or any rights dependent upon them, shall be recognized here, belongs to the legislative or law-making power of this State, and that the judiciary, whose province is only to declare, and not to make, the law, must be guided in their decision by the principle and policy adopted by the legislature of this State in reference to this question. And in ascertaining what this legislative policy is, we are to be guided not only by such

express provisions as they have chosen to make, and the natural implication from them, but also by their silence, which may furnish as clear an indication of what that policy was intended to be, as can be drawn from what they *have expressed*; since, if they have made no provision at all upon the particular subject, or branch of the subject, or question involved, it may reasonably be inferred that they intended to adopt, and left to the courts to apply, the generally received principles of comity, and, to that extent, to adopt the foreign law, or rather to recognize the rights dependent upon such laws; and if they have chosen to leave the matter without any legislative provision, the case must be a very clear one indeed, which would authorize the courts to refuse such recognition, on the ground that it would be prejudicial to the interests of the State; since the legislature are the proper representatives of the public interest, and, having the exclusive power to determine what shall be the public policy of the State, if they have chosen to make no enactment upon the subject, it is natural to infer they omitted to do so because they thought it unnecessary, and that the generally recognized principles would be sufficient for such cases. None of the foregoing principles have been seriously questioned in this case, so far as they relate to the power and capacity of corporations, created in one State, to make and enforce contracts, and to acquire *personal* property in another.

But it is insisted that the question of the power or capacity to take the title to real estate, to hold and dispose of it, stands upon a different ground from that of acquiring personal property. There are undoubtedly some differences between personal and real property, in respect to the laws by which they are to be governed; but whether they affect the present case remains to be seen. Thus, personal property generally follows the person of the owner, or, in other words, the right to, and the mode of acquiring and disposing of, personal property, are generally to be governed by the law of the domicile of the owner, while real estate, in every thing which pertains to the mode and validity of conveyance and transfer, depends upon the law of the place in which it is situated. But it would be entirely competent for each distinct sovereignty to adopt, in this respect, the same rule as to both kinds of property within its limits, if it thought fit to do so; and it is by comity only, that personal property, in one State or country, is allowed to be governed by the laws of another. As to the mode of acquiring, and transferring,

and transmitting, real estate, that comity has not been carried so far as to allow the foreign law to govern the mode or form of conveyance. And in most countries formerly, and in many even now, it has been the custom to establish their own peculiar rules governing the capacity of parties to take, or the parties capable of taking and transferring, real estate, while this has not been usual with reference to the capacity to take, hold, or transmit personal property. Thus, in England, and formerly in many of the United States, though aliens might take, they could not hold, land, if claimed by the king or the State, and could not transmit or convey it. But it is quite competent for any sovereignty or State to abolish this distinction, and to make the capacity the same in both cases, without any restriction upon either. This is precisely what has been done in this State, and in most of the other States of the Union. Our statute (Rev. Stat. of 1846, ch. 66, § 35) places aliens, whether residents of the State or not, upon the same footing in all respects as native citizens of the State, or of the United States, in reference to the right to acquire, hold, convey and transmit lands. And the constitution prohibits the legislature from establishing any less liberal rule, as to such aliens as are or may be residents of the State. Art. 18, § 13. All persons alike, therefore, without reference to nationality, race, color, sex or age, who in this State are competent to take, hold, convey, or transmit personal property, can do the same with real estate. The rule is general as to both, and legislative action would be required to create an exception as to either. In fact, lands, in all the western States at least, have become about as much articles of trade and commerce, as goods or other personal property, and it has been the policy of most of them to encourage this traffic, and to facilitate the acquisition and transfer of real estate.

Among the powers or capacities incident to a corporation at common law, without any special mention in their charter, was that of taking, holding and conveying lands; and these incidents still remain even in this country, where charters are granted only by the legislature; subject only to such restrictions as the legislature has seen fit to impose, by express provision or tacit implication. The act of incorporation, in effect, gives to the corporation substantially the powers and faculties of a natural person, except as they are in some way restrained by the act of incorporation, or some other law of the State creating it.

When, therefore, a corporation is created in the State of Indiana, with powers, so far as that State can give them, of taking, holding and conveying lands in this State, I do not see upon what principle it can be held that an affirmative enabling act in this State is necessary to give them the capacity to take, hold and convey such lands here, unless our legislature have, expressly or by implication, forbidden it. The question of capacity seems to me to rest upon the principles of comity, as much as their capacity to make or enforce contracts, or to acquire, hold or convey personal property. I say the question seems to me to rest upon the same principles, but by this I do not mean that there may not be stronger reasons against recognizing that capacity as to land, than as to personal property; but these are all reasons of public policy which bear upon the question of comity, and, therefore, more appropriate for the legislature than the courts. Thus the main, if not the only, evils to be apprehended from allowing corporations, domestic or foreign, to take, hold or convey lands are: 1st. The danger of their becoming speculators in lands to large amounts, keeping them unimproved and thereby retarding the progress of settlement and improvement, or, if improved, preventing settlers from obtaining clear or independent titles, and introducing a system of tenancies in which the tenants would be, in a great measure, dependent upon such corporations; 2d. The holding of such lands for a long period of time, as they pass by perpetual succession without any change or break by death, as in the case of natural persons; and, 3d. The influence which wealthy corporations, holding large bodies of land in the State, might exercise upon the legislature. These considerations apply with no peculiar force to railroad corporations as such, but equally to banking, manufacturing, insurance or other corporations; and they are all very proper considerations for a constitutional convention, in framing the fundamental law, and for the people in adopting it, as well as for the legislature, who, in all matters not fixed by the constitution, are properly vested with the power of determining the public policy. And in a case where it should very clearly appear to the court from the amount of the lands purchased, or the purpose for which they were purchased, or other circumstances, that the dangers I have mentioned were seriously to be apprehended, it may be (though the present case does not call for an opinion upon this point), that the court would be authorized, without any legislative prohibition to that end, to refuse

Thompson v. Waters.

to recognize the law of the State creating the corporation, or so much of it as had undertaken to confer the right of holding such lands; and, consequently, to treat the conveyance as void for want of such capacity. But when, from the nature of the case, no such danger can be reasonably apprehended, I see no very intelligible ground upon which the court could thus treat the conveyance as void, unless the legislative department, in some way, have clearly indicated a policy which requires it.

In accordance with the principles already explained, it was held, in *State v. Boston, Concord & Montreal R. R. Co.*, 25 Vt. 433 (Judge REDFIELD giving the opinion), that a railroad company, chartered in the State of New Hampshire, had the right and the capacity to purchase lands in the State of Vermont, without any act of the latter State affirmatively authorizing it, though the land was not taken in payment of, or security for, a debt due the company, but for the purpose of being used in connection with their road, if it should ever be connected with a road authorized in the latter State. And it may or may not, also legitimately result from the principles I have already expressed, that in the case now before us, the Fort Wayne & Chicago Railroad Company had the capacity to take this land by the conveyance from Johnson, and to hold and convey the same, though the conveyance were shown to have been made to the company in consideration and in payment of Johnson's subscription to the stock of the company; inasmuch as the statute of Indiana, which gave the authority to receive the land for stock, also required the lands thus received to be sold within a reasonable time, and the proceeds applied for the construction of their road and its appurtenances; and it must naturally be supposed to have been for the interest of the company to make an early sale, without which the stock subscribed and for which the land was received, could not be rendered available; and the courts of Indiana have by judicial decision fixed the "reasonable time" within which a sale of such lands should be made, at ten years (15 Ind. 459), in exact accordance with the provision of our constitution (which took effect January 1, 1851), which provides, that "No corporation shall hold any real estate hereafter acquired, for a longer period than ten years, except such real estate as shall be actually occupied by such corporation in the exercise of its franchises,"—a provision which goes upon the assumption or admission that real estate, though not actu-

ally occupied by a corporation in the exercise of its franchises, *may hereafter be acquired*, and applies to no other.

But I express no opinion in this case, upon the question, what would be the effect of the conveyance by Johnson to the company, if made in consideration of, or in payment for, stock. This question is not involved in the case. The record does not show that such was the consideration of that conveyance, nor in fact what the consideration was, except that the deed expresses upon its face the consideration of \$1,600. But this is equally consistent with the fact, that the conveyance was made in payment of a debt, due from Johnson to the company, as that it was paid in any other way. Now, as it does not appear from the record that the conveyance was made in payment for stock, nor what was the actual consideration for, or purpose of, the conveyance, and we are not allowed to presume illegality, but must presume the transaction to have been legal till the contrary is shown; if the deed would have been void for want of capacity to take, if given for one species of consideration, or for one purpose, but the company had capacity to take, and the deed would be valid, if made for any other consideration or purpose, we are bound to presume that it was made for the consideration and for the purpose for which the company had the right and capacity to take it; and consequently the conveyance must be held valid, if it was legally possible for the company to take the title, for *any purpose* or upon any consideration *whatever*. *Regents of the University v. Detroit Young Men's Society*, 12 Mich. 138.

If, therefore, this company had the power or capacity to take this land, in satisfaction of a debt due it from Johnson, accruing in the legitimate prosecution of its business, the conveyance must be held valid, and the company must be held to have had the capacity to take the title and the power to convey it.

Now, whatever danger might be apprehended from allowing corporations of other States to take lands for stock, or for purposes of speculation, I cannot conceive that the privilege of taking lands, in good faith, in payment of debts, and which must, therefore, be merely occasional, and with the intention and for the purpose of converting them into money for the realization of the proceeds, can be so dangerous to the public interest of this State or its citizens, as to authorize the courts to declare such conveyance void, on that ground; especially as the property could only be held for ten years, under the constitutional provision already cited. And I think it

Thompson v. Waters.

may be laid down as a safe and sound principle that, unless the constitution of the State, or its legislature, have, either expressly or by clear implication, declared a contrary rule, the courts of any State are bound to recognize this right of the corporations of other States, thus to realize and collect the debts due to them ; and such seems to have been the course of decisions in the several States where this question has arisen. See *Silver Lake Bank v. North*, 4 Johns. Ch. 370 ; *Lumbard v. Aldrich*, 8 N. H. 31 ; *New York Dry Dock v. Hicks*, 5 McLean, 111 ; *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 114. Though in the first and the last of the cases above cited, the question arose upon a mortgage to such corporation, yet, in Kentucky certainly, a mortgage conveys the legal title ; and, therefore, the question is the same as here ; and I think the same may be said of the law of New York, when the mortgage was executed, which came in question in the case first above cited. In the other cases the question arises directly upon the power to take the title.

Most of these decisions expressly, and the others tacitly, go upon the ground that, inasmuch as corporations have the right to make contracts in States other than that of their creation, and to enforce them in the courts of such States (a right not disputed in the present case), in the same manner as an individual of another State is allowed to contract and to sue, they must, in the absence of any legislation to the contrary, be allowed to enforce their judgments in the same way, and have the right to avail themselves of all the same means and facilities for that purpose ; and, consequently, that where the individual has the right to obtain the title to lands under execution, the same right must be accorded to such corporations ; and that, having the right thus to acquire the title by the compulsory means of an execution, the debtor may, by voluntary agreement, do what, without his consent, the law would compel ; and that he may, therefore, convey, by his own deed, the title which, if he had not thus conveyed, the law would, by its process, have conveyed in spite of him. It is true as to the case cited from New Hampshire (*Lumbard v. Aldrich*, *ubi supra*), the law of that State did not (at that time, at least) permit a sale of land, upon execution to the highest bidder, but the proceeding was by appraisal, and setting off to the creditor — in other words, by extent — by which none but the creditor could take the title (see *Morse v. Child et al.*, 7 N. H. 583, etc.) ; and in this case the reasoning above adverted to was, therefore, absolutely conclu-

sive, if the right to sue in the courts of New Hampshire were admitted or shown. But in the other cases cited, the land might be sold on execution or decree to the highest bidder, as in this State; and yet the same course of reasoning was held to apply; and I think properly so held; for, though the law in this State, for instance, requires a sale of land upon execution, at which any person, as well as the creditor, can bid; yet, in a question of the kind now before us, we ought to take a practical, rather than a mere theoretical, view of the question; and we know, as matter of fact, that, while the law requires a sale to the highest bidder, there is not one case in fifty, of a sale upon execution, subject as it is to redemption, in which a sale can be made for any reasonable price, if at all, except to the creditor; and, consequently, the creditor is almost always compelled to bid off the land, or lose his debt, or most of it; and it is, or should be, the policy of the law to have the property sell for its real value, or as near it as may be, which can seldom happen, except when sold to the creditor himself.

This power of foreign corporations to take lands in payment of debts has not, so far as I have been able to find, been anywhere treated as one which is in any way dangerous to the citizens, or inconsistent with the public policy of any State; and I have been unable to find a single decided case, in which the question was directly involved, where the power has been denied; and I am not willing to take the lead in establishing a contrary doctrine—a doctrine which, in its injustice, narrowness and illiberality, if not inhospitality, may have much to commend it to Chinese exclusiveness, but nothing in harmony with the liberal spirit of American commercial intercourse.

But we have ourselves, in this court, already held that a foreign banking corporation may take the title to lands in this State, in payment of debts, and impliedly that such corporation may sell such land. See *Ives v. Bank of Lansingburgh*, 12 Mich. 361, a case which arose since our present constitution. And we have in several instances recognized the right of such foreign corporations as *cestui que trusts*, when the legal title was vested in a trustee. See *Trask v. Green*, 9 Mich. 358; *Taylor v. Boardman*, 24 id. 287; and, so far as affects any question of State policy, or danger to be apprehended from foreign corporations owning lands in this State, or any question of comity, I can see no difference between the recognition of such equitable interest, and the legal estate; since the corpora-

tion would ordinarily, in both cases alike, control the land. And, in every case of a naked trust, the statute itself executes the trust and places the legal estate in the *cestui que trust*. Rev. Stat. 1846, ch. 63, § 3.

Now, as already remarked, there is nothing peculiar to railroad corporations, so far as any question of comity, or danger, or prejudice to the interests of the people or the public interests is involved. But all the same objections of this nature would apply as well and as strongly in the case of a foreign banking, as a foreign railroad, corporation; so that I think the question in the present case may be looked upon as decided in favor of the right of this company to take this land in payment of a debt, unless we shall find some legislative prohibition.

It remains, therefore, only to see whether such prohibition is to be found in our statutes. The only provisions to be found in our statutes expressly in reference to foreign corporations, which can be claimed to have any bearing upon the question, are the following, which I think do not tend to negative the rule which I have endeavored to show is the rule of comity: Section 1 of chapter 116 of the Revised Statutes of 1846 (Comp. L. 1857, § 4833) provides: "A foreign corporation, created by the laws of any other State or country, may prosecute in the courts of this State, in the same manner as corporations created under the laws of this State, upon giving security for the payment of the costs of suit, in the same manner that non-residents are required by law to do."

This section, instead of rejecting or modifying the rule of comity, expressly adopts the substance of that rule, so far as the enactment extends, and goes only to confirm the conclusions at which I have arrived.

The next section provides: "But when, by the laws of this State, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of, such act."

This section applies only to acts which, by the laws of this State, are forbidden to be done "by any corporation or association of individuals, without *express* authority of law. It does not apply at all to cases where only some particular corporation, or even a particular

class of corporations, is forbidden by the laws of this State to do certain things, but only to cases where such prohibition is general, applying to all corporations and all associations of individuals, in this State. It puts the foreign corporations, in all the enumerated particulars, upon the same footing as domestic corporations are placed by those State laws, and *those only*, which apply *generally to all* the corporations in the State, but not as some particular corporation or class of corporations may be placed by some law specially applicable to them.

This again is, I think, the proper and generally recognized measure of State comity. A subsequent section makes provision for attachment against foreign corporations. These are all the provisions to be found in our statutes, at the time of this conveyance, having express reference to foreign corporations, which have any possible bearing upon the question here involved.

If we look to the several separate acts of incorporation in force at the time, and endeavor to extract from them a legislative policy in reference to our own domestic corporations, as to the power or capacity in question, we shall find that, owing to the great variety and dissimilarity of the several acts in this respect, no reasonably certain or satisfactory conclusion can be drawn; and no court can safely declare a State or legislative policy upon grounds so utterly unstable and conjectural. Some of these acts gave express power to take and dispose of real and personal estate without any restriction whatever, leaving them exactly upon the same footing as corporations at common law; others allowed them to hold and dispose of real estate up to a certain amount in value; others limited the right by the quantity of acres; some of them restricted the right to such lands as might be required for the proper corporation buildings and such as might be taken or conveyed to it in payment, satisfaction or security for debts due the corporation; some neither expressly gave or restricted the power to take lands, and left the corporation with all the common-law incidents in this respect; and others were very restrictive in confining the right to such lands only as were used in the exercise of their corporate franchises. Under many of them, perhaps most of them, the right to take lands in payment of debts in good faith accruing to the corporation in the prosecution of their business, would be very clear; since this would follow as an incident to any corporation, unless in some way restrained by the charter. It may

Thompson v. Waters.

be true, as a general observation, that the railroad charters granted in the State were more restrictive, in this respect, than those of several other species; but, as I have already shown, so far as material to the question of comity, and what rights of *foreign* corporations are to be recognized, no distinction in principle can be made between railroad and other corporations; and if the latter have been made more restrictive, as an average, it has been for reasons foreign to the question here involved.

Bearing in mind the great variety and discrepancy, in this respect, in the great number of separate charters or acts of incorporation, as well those granted prior, as those subsequent, to chap. 55 of the R. S. of 1846, let us examine the seventh section of the chapter, remembering, however, that it was not competent for the legislature, by these general provisions, to take away from any previously existing corporation any corporate right granted by the charter, and that it was equally incompetent, by any of these provisions, to tie the hands of future legislatures, should they see fit to make any different provisions either in a special charter or by general law. *Section seven*, which, by its context, applies generally to all corporations, created or to be created, in the State, declares: "Every such corporation may hold land to an amount authorized by law, and may convey the same." There is no possible view in which this provision was *necessary* for *any* purpose. But we are bound so to construe it, if possible, as not to make it pure nonsense. This provision, of itself, neither gives nor takes away any power whatever. It merely recognizes such powers as any such corporation then had, or might thereafter have, "by law." If, by the terms, "may hold land to an amount authorized by law," we are to understand such lands only as, by *express provision of statute*, they were authorized to hold, then it has no possible force or operation whatever, and its insertion was sheer nonsense; for, in such case, the corporation would take their authority from the statute conferring it, and not from *this general* provision, which can neither add to, nor take from, its force; and, upon this theory of interpretation, no possible object could have existed for its enactment. When a statute expressly confers a right, it does not need another statute to declare, or to give it, its effect. But if the term, "authorized by law," were intended to include those incidental powers or rights to hold lands, which result, as common-law incidents, from the creation of a corporation, without being expressed, so far as such incidents

People v. Dawell.

were not restrained by the legislature; then, though the statute was not necessary, it is not so purely nonsensical as it would be upon the other interpretation; as it may be treated as a declaratory statute merely. It is in this sense, and this only, that it can have any supposable or possible effect upon, or application to, the various corporations then existing, or thereafter to be created. In effect, therefore, when applied to such corporations, in the light of the existing statutes and the common law, the provision is nothing more than a declaration, that corporations might hold and convey lands, wherever this common-law right was in no way restrained by the legislature.

I find no other statute, then in force, which can have any possible bearing upon the question. The legislature have, in no respect material to the present case, adopted any policy, or enacted any statute, modifying the generally received doctrine of comity. And I think the company had the capacity to take, and did take, the title to the lands, and that their deed, with that of McCullough, the mortgagee and trustee, conveyed the title to the plaintiff; that the court erred in charging to the contrary, and that the judgment should be reversed, with costs, and a new trial awarded.

COOLEY, J., concurred.

CAMPBELL, J., delivered a dissenting opinion.

GRAVES, J., did not sit.

PEOPLE V. DAWELL.

(25 Mich. 247.)

Judgment of another State when not conclusive — Divorce — jurisdiction — Bigamy.

To an indictment for bigamy defendant set up a divorce obtained by his first wife in Indiana. The record in the divorce case recited that the parties were residents of Indiana. *Held*, (1) that evidence was admissible to show that they were not such in fact; (2) that if the parties were not such residents the divorce was void and no defense to the indictment. (*See note, p. 274.*)

INFORMATION for bigamy. The opinion states the case.

Dwight May, attorney-general, for people.

Mason & Melendy, for defendant.

COOLEY, J. This defendant has been convicted of bigamy, and now, upon exceptions, asks that the verdict be set aside. Both the marriages were admitted. The first took place in 1857; the second was to one Minnie Kopp, in August, 1871, while the first wife was still living. The defense was, that before the second marriage the defendant had been divorced from his first wife, on her application. To establish this, he gave in evidence a copy of the record of a proceeding in the court of common pleas of Noble county, Indiana, which contained: 1. What purported to be a complaint of Mary, the first wife, against the defendant, presented at the October term, 1870, averring her residence in Noble county; charging defendant with refusal to speak with or treat her as a wife, and finally with refusal to cohabit with her, and with abandonment, and praying for a divorce; 2. An authority from the defendant to one Goodwin, an attorney of Noble county, "to appear for me in any court of record of said county, and answer for me, and waive process that my wife, Mary Dawell, may procure a bill of divorce;" 3. An answer by Goodwin, on behalf of defendant, admitting the wife's residence in Noble county, but denying all the other allegations of the complaint; 4. A judgment of the court, rendered on the third day of the same October term, purporting to be based on evidence, and declaring the marriage dissolved.

This expeditious proceeding, in which the defendant, in voluntarily appearing, declares his purpose to be to enable his wife to obtain a divorce, bears upon its face such evidence of collusion as, in this State, would justify the setting aside of the decree, whenever attention should be called to the facts; and we do not doubt that such would be the case in Indiana also, for the supreme court of that State has very carefully laid down the doctrine that divorces by collusion are not to be suffered to stand. *Scott v. Scott*, 17 Ind. 309. But until the degree should be set aside or reversed by the action of a competent court, it could not be treated as void on the ground here indicated.

The prosecution claimed on the trial that the whole proceeding

People v. Dawell.

was void for want of jurisdiction; that the courts of Indiana never had any authority to decree a divorce between the parties, and that the decree in the case was procured by a fraud upon the law and deception practiced upon the court. To establish this they introduced evidence tending to show that the said Mary Dawell and William Dawell, mentioned in said record, were, during the whole of the year 1870, residents of the county of St. Joseph, and State of Michigan, and that they had resided, and still continued to reside, in said county of St. Joseph, in the same house, for more than two years preceding the time of trial (January 25, 1872), and never resided in the State of Indiana, and that during that time the said Minnie Kopp had resided with them. The prosecution then introduced the said Goodwin as a witness, who testified as follows: "I resided at Kendallville, Indiana, in October, 1870; am by profession an attorney at law." Being then shown the Noble county record, he proceeded: "I have knowledge of this case; I appeared for the defendant, William Dawell, in said court; I had what purported to be authority to appear for him, handed me by Mr. J. B. Wade, attorney for plaintiff in said proceeding; I have before me the original authority; it is in writing; I think I know Mr. Wade's handwriting; I have seen him write; the body of this is in Mr. Wade's handwriting; the signature is that of some other person; I find the record to contain a true copy of the original authority handed me by Mr. Wade; I filed the paper with the clerk of said court of common pleas of Noble county, in said cause; I drew an answer for said defendant in said cause, at the request of said J. B. Wade, and caused it to be filed; I met Mr. Wade at Albion; he said he had a divorce case in court there, and showed me this authority for me to appear; I received it; Mr. Wade and the judge were conversing about the matter; Mr. Wade asked me to make certain admissions as to residence of the plaintiff; he told me the parties lived near Wolcottville, in Noble county, Indiana, and had for the last two or three years; I did so, and waived service of process in the answer, at Wade's request; I never saw the defendant in that, nor until here in court in this case; I received no compensation except the thanks of Mr. Wade."

Upon this evidence the counsel for the defendant made several requests for instructions to the jury, the substance of which was, that the record of divorce in Noble county was a complete protection to the defendant in this prosecution, even though the divorce

People v. Dawell.

may have been obtained by fraud, either in giving the court jurisdiction or in proving the allegations of the petition; that the question of fraud cannot be raised except by the parties to the record, and consequently cannot be gone into in this proceeding; and, if it could be, no evidence has been given in the case having a tendency to establish it. The court declined these requests, and charged the jury as follows:

"1. The defendant in open court having admitted his first marriage to Mary Dawell, and afterward his second marriage, in this county, to Minnie Kopp, his former wife being then still alive, as charged in the information against him, and evidence having also been offered before you to show that the said Mary Dawell and the said defendant were, at the time of said last marriage, and for a year or more next preceding had been, residents of this county of St. Joseph, which is not controverted by the said defendant, the charge of polygamy, alleged in the information, is *prima facie* made out against the defendant, and the burden of proof is upon him to show that prior to his said second marriage he had been legally divorced from said Mary Dawell, or to show some other legal excuse or justification under the statute.

"2. If you find from the evidence that at the time the alleged proceedings for a divorce were instituted, and a decree of divorce obtained in the court of common pleas of Noble county, Indiana, introduced in evidence on behalf of the respondent in this case, the said Mary Dawell and the respondent were each of them actual residents of this State, and had been for a year or more immediately preceding the time of instituting the said proceedings, and the obtaining of the said decree, and were neither of them at the time residents of the State of Indiana, then the said decree of divorce is no defense to this prosecution.

"3. If you find from the evidence that the said first wife, Mary Dawell, and the said defendant, at the time the said proceedings were instituted, and the said decree of divorce obtained, in the court of common pleas of Noble county, Indiana, were neither of them residents of said State of Indiana, but were residents of this State, and that said proceedings were commenced by agreement or collusion between the said parties, in this State, to obtain a divorce in the State of Indiana, then such decree is no defense in this prosecution.

"4. If you find from the evidence that said proceedings for a

divorce in the court of common pleas of Noble county, Indiana, were instituted by the said defendant in this case, William Dawell, without the knowledge or consent of his said first wife, Mary Dawell, and that she never actually appeared in the case, and never authorized any one to appear for her in said proceeding, then said decree is no defense to this action.

"5. If you find that either of the parties was a resident of Indiana at the time said proceedings were instituted and said decree of divorce obtained, and that both parties voluntarily appeared in the said suit, or authorized their appearance to be entered therein, then said decree is a perfect defense to this action."

The defendant insists that all these charges, except the last, were erroneous, and it is upon exceptions to these, and to the admission of the evidence upon which they were based, that we are now to review the trial.

It is worthy of notice at the outset that neither the first wife nor the attorney who nominally appeared for her in the State of Indiana was made a witness on the trial. It was not in the power of the prosecution to make a witness of the first wife, except with defendant's assent; but he was at liberty under our statutes to call her if he saw fit to do so. Neither could the prosecution take the testimony of the attorney, by commission; but the defendant might have done so, if he supposed that any facts within his knowledge would be of service to the defense. These facts may be of no importance to the decision of this cause, but they are not to be overlooked when we come to consider the consequences to which the doctrines maintained on behalf of the defense must lead. The decree of divorce under consideration was obtained either by fraudulent collusion between the parties, or if not by collusion, then the husband must have caused the complaint to be filed in the wife's name, and practiced a fraud upon her, as well as upon the law and the court. The appearance of the record, as I have already said, indicates collusion, but it is a most significant circumstance that the only party who by the evidence is shown in any manner to have had any thing to do with the case, is the defendant himself, who was the accused party. If the authority to appear for him was genuine, as we must presume it to have been, since the defendant relies upon it, he appears to have been a party willing, anxious, and eager to have his own turpitude established immediately; he waives service of process, and the proceeding is accelerated in a manner wholly unknown to, and inad-

People v. Dawell.

missible under, the laws of this State. The attorney who nominally acts for the plaintiff, in fact, is shown to be acting for the defendant, to the extent, at the least, of drafting an authority to appear, and of securing an attorney to put in a sham defense, the principal purpose of which seems to have been falsely to admit the facts giving the court jurisdiction. From the evidence all the inferences are against the wife having ever had any thing whatever to do with the case ; her mouth is closed ; she cannot tell her own story, and the prosecution cannot compel the attorney who nominally acted for her, to tell his, though the defendant might have done so. We cannot know, therefore, whether the wife was aware of the filing of the complaint in her name or not, unless the defendant sees fit to open to us the sources of information ; but as we catch not a single glimpse of her as an actor in the transaction anywhere, and the attorney nominally appearing for her is shown to have been really acting for the husband, it is not a violent presumption, that the wife may have been ignorant of the whole proceeding, and that, in its inception, in the employment of counsel, in the false admission of facts, and in its conclusion, it was an unmitigated outrage upon her rights, perpetrated under her husband's direction and at his expense, for the gratification of his own desires.

But I do not propose to consider very particularly the specific facts of this case, but rather to examine the principle that underlies them, in order to determine, if possible, how far the defendant is correct in his position, that the divorce, notwithstanding its fraudulent character, is a complete defense in this proceeding. This question, as it appears to me, is one of the most serious and important which we ever have had occasion to consider ; and it vitally concerns the good order and reputation of the State, and the morals of its people. In its essence it is no more or less than this: Does the State of Michigan establish and control the domestic relations of its own citizens, or do they exist and continue only at the discretion of the inferior courts of another State ?

In considering this subject I do not have occasion to call in question the wisdom of the divorce laws of our sister State, or the justice or propriety with which those laws have been administered by the supreme judicial tribunal of that State. The decisions of that tribunal have, in the main, I think, been wise and sound, and such as we all concur in ; but it is a fact, which I think I may justly say is well known and understood, that in the inferior tribunals of that

State, divorces are obtained with more facility than in the circuit courts of Michigan, and that, in consequence, married persons in this State, discontented in their relations, or smitten with a new passion, but having no good cause for divorce, have frequently, and sometimes under very outrageous circumstances, resorted to Indiana and obtained a decree purporting to dissolve their marriage relations.

Now I understand the rule to be, that to give the courts of any State jurisdiction over the marriage relation between a husband and his wife, one of the parties, at least, must have a domicile within that State. Some of the judicial decisions make further requirements; but no court has ever held that any less could be demanded. It is, then, and must be, admitted on all hands, that while these parties had their residence within this State, the courts of Indiana had no authority to consider the question of divorcing them. That was a matter which pertained exclusively to the authorities of this State. Our legislation forbids plural marriages, but establishes exceedingly liberal regulations for divorce, under which parties who are wronged in their marriage relations, are enabled to have them severed, on showing cause. But we do not think it conducive to good morals, or public decency, that married parties should be allowed to change spouses at discretion, or that a husband who had tired of his wife, whose charms perhaps had faded in the bearing and nursing of his children, should be at liberty at any time, by going through some formal proceeding in court, to turn her out of his doors, that he might supplant her with some fresher beauty. All our legislation has been framed in the belief that the marriage tie should be indissoluble, except upon cause shown; and of the sufficiency of this cause the parties themselves are not allowed to be the judges. This is the view that obtains in this State. It may be right, or it may be wrong. There have been those within the limits of the State who thought polygamy proper, and others who have believed that marriage should be only during the good pleasure of the parties; but the prevailing sentiment has condemned these notions as licentious and demoralizing, and has forbidden, under severe penalties, their practical realization within this State. If other States or countries hold different opinions, they can embody them in their own legislation, if they see fit; but it will be conceded that they have no right to invade our jurisdiction to right

any wrongs which they may suppose to exist in our laws upon this subject.

It is clear, then, that the court in Indiana had no authority to decree a divorce between these parties. Any wrong against the marriage relation between them, concerned this State, and not that; and was inquirable into by the courts of Michigan, and not by those of Indiana. But if the decree was granted without authority, why is it not absolutely and for all purposes void?

To this it is replied, that the record shows a finding by the Indiana court that the parties resided in that State, and that this finding is conclusive upon the question of jurisdiction, except on motion in the same court to vacate the decree. That doctrine brings us to this: That although the Indiana court had no jurisdiction to divorce two of our citizens, yet, having assumed to do so, on the false statement of one or both of the parties, that they resided in Indiana, the decree is absolutely binding, unless the court sees fit to vacate it. In other words, the marriage relation between two of our citizens depends upon the discretion of a foreign court, which by law has no concern with it whatever. Such a doctrine is not only monstrous in its results, but it has, as I conceive, no support whatever in authority. It has been held invariably, that a foreign judgment is open to be assailed by evidence showing a want of jurisdiction. The only question in dispute has been, whether the recitals in the record of the appearance of the parties could be disproved for this purpose — some cases holding that they could, others that, in the case of a judgment of a sister State, they could not. That particular question, as an abstract one, I do not discuss, because I conceive there is a difference between disproving recitals of jurisdiction of the parties and jurisdiction of the subject-matter in divorce cases, which is the point involved here. If this might not be disproved, a party seeking a divorce need only apply for it in some distant country, and find suitable tools to aid his fraud, and the difficulty and expense attending a proceeding to exhibit the facts to the satisfaction of the same court would, in most cases, be so great as absolutely to preclude the attempt. Thus it would be easy to give to the courts of any country whose jurisprudence we recognize as that of a civilized people, the power to divorce one of our citizens, under circumstances of wrong and outrage upon the other party, and yet no practicable remedy be open to the party wronged. And even if a practicable remedy were open to the party, if he should

see fit not to pursue it, there would be none whatever for the State among whose citizens disorder and license would thus be introduced.

But it is said that if the parties appear in the case, the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively. But such is not the case under our laws, nor will it ever be until it comes to be understood that parties have the right to marry and unmarry at pleasure, and that if they choose to trade spouses, it is the concern of nobody but themselves. Such an understanding would require a considerable change in the existing laws of this State. As those laws now are, there are three parties to every divorce proceeding—the husband, the wife and the State; the first two parties representing their respective interests as individuals; the State concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion. The State of Indiana has recognized this fact, in requiring an appearance in divorce suits by a public officer, whose duty it should be to see that a legal case was established (2 Rev. Stat. 238); and though we have no similar statutory requirement in this State, we have always recognized the principle, and the court has considered it its duty to inquire specially into collusion in every case, and to deny a divorce wherever collusion appeared, even though a satisfactory case might seem to have been *prima facie* established. Such being the case, suppose we admit that the parties to the marriage may be bound by their voluntary appearance in the foreign jurisdiction, how does that affect the present case? How and in what manner did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the State of Michigan? Has this State ever, directly or indirectly, consented that a matter of high interest to itself, and no way concerning the people of Indiana, shall be tried by the tribunals of the latter State? Has it ever waived its right to govern the domestic relations of its own citizens, and consented that an inferior judicial officer of another State, in whose choice its electors have not been consulted, may exercise over them, with or without the consent of parties, a power of final control? Those who insist upon the validity and binding force of this decree should be able to point out how and in what manner, by what written or oral consent, or through what neglect or default, this third party has lost its right to have its own

People v. Dawell.

concerns passed upon by its own courts, or has handed them over to a foreign authority. Nothing in this record shows such consent or such waiver, even if it were competent for the State to give it; all that appears here is, falsehood and fraud, practiced and employed upon the tribunals of another State, in order to induce them to take cognizance of a controversy which belongs to the tribunals of this State; but which, for some unexplained reason, certainly not an honest one, the parties, or the acting one of them, are unwilling to submit to the proper court.

This third party, therefore, not having consented to the proceedings, expressly or impliedly, and the foreign tribunal having confessedly no authority over the subject-matter unless it could obtain it by consent, there would seem to be very little more to be said upon this case. As to the State, at least, the divorce must be void, and the State has very properly treated it as void, by instituting this prosecution. And the State has obviously no other remedy for the wrong done it; for, as a State, it cannot appear in the foreign court to ask that the fraudulent divorce be vacated.

It is insisted, however, with great earnestness, that whatever might have been the case otherwise, the provision in the constitution of the United States that full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other State (Const. U. S., art. 4, § 1), will preclude our inquiry into the validity of this divorce. If that provision of the constitution could be so construed as to protect and make valid a fraudulent proceeding like the one in question, it would certainly be a most singular perversion of its original purpose. The provision itself was eminently wise and proper. It had for its object to prevent any such weakening of the bonds of the Federal Union, as might follow from the States disregarding what was due to courtesy and comity when their respective proceedings should come under consideration, and opening anew the controversies and questions, which, in the jurisdiction having properly and primarily the control of them, had once been determined. Its whole purpose and aim was in the direction of justice, comity, and good neighborhood between the States; and it would be most remarkable if it could now be employed to bolster up a proceeding where a court of one State has interfered in a matter which wholly pertains to the concerns of another State; which is within the exclusive jurisdiction of such other State, and relates to its citizens exclusively; which it

is impertinent for such court, in any manner, to meddle with, and which justice, as well as every principle of comity, requires such court to let alone. If the constitutional provision can be so employed, then I do not hesitate to say, that it is capable of accomplishing more evils than it has the power to prevent, and that, too, in the very direction in which its good influences were anticipated. For the effect is, to destroy the inter-state comity, and good neighborhood, by enabling one State to extend its laws and legal procedure into the domain of its neighbor; to subject the citizens of such neighbor to its own control in their most important relation of life, and to introduce among them practices which their own laws regard as, in a very high degree, vicious and demoralizing. What could possibly tend, in a greater degree, to destroy the good feeling existing between the people of Michigan and the people of Indiana, as citizens of one common country, than to have it understood, that the courts of the latter State were in the practice of divorcing the citizens of the former at discretion, in entire disregard of the local law, and of all the rules which have been established here in the interest of good morals and public justice? Can the people of Michigan regard a case like the one before us, as any thing else than a wrong to their jurisdiction, and an invasion of the sovereign rights of the State, and will not their attachment to the Federal constitution be weakened if they are to be told that such things are to be protected, and the guilty parties shielded under its provisions; or, at least, that it precludes any other remedy than one which rests in the discretion of an officer who resides beyond the limits of the State to which the parties are amenable, to whom it will be only at much expense and with much difficulty, that the proper application and showing for redress can generally be made, and who, when reached, has no power whatever to punish the guilty parties, but can only, at most, if he shall see fit to do so, deprive them of the expected fruits of their misconduct?

But I do not concede that the Federal constitution will properly admit of any such construction. That instrument is not one to be construed technically; it was meant to subserve great and beneficial ends; and any narrow and technical construction that makes it defeat those ends, and work mischief, is obviously a perversion of its real meaning. The provision in question was not designed to make good a judgment rendered without jurisdiction; its object was, so far as judgments are concerned, to preclude their being disre-

People v. Dawell.

garded in other States when a proper tribunal, with competent jurisdiction, had rendered them. Many decisions of the Federal courts were cited on the argument for the defense, but none of them holds that a void judgment is validated by this provision. The most of them were cases of money demands, or suits for property, where only the parties to the record were concerned, and the rights and sovereignty of another State were in no way involved. They presented the question generally, whether the defendant had been properly brought in; and they have very little analogy to a case of divorce, where the State, the third party concerned, neither does nor can appear abroad, and where the defendant can easily contrive to be the sole actor, as he probably was in this case, and may possibly bring the proceedings to the knowledge of the wife for the first time when, armed with the decree of the foreign court, he notifies her to leave his bed and board to make room for a new comer. The case most relied upon is *Cheever v. Wilson*, 9 Wall. 108, but I discover nothing in it that can benefit the defendant. It does not appear to have been disputed there, that the complainant had a nominal residence in the jurisdiction where the divorce was rendered, but it was claimed that it was colorable merely. The court, without deciding whether the finding of the residence by the record could be disproved, held that no adequate testimony had been introduced for the purpose. The point here involved was, therefore, expressly left undecided. Moreover, nothing was involved in that case but property rights; and as it was clear that both parties appeared and were actors in the divorce proceedings, they and their privies might very properly be held precluded from attaching the decree, so far as it affected such rights, by a suggestion of their own fraud. Obviously, that would be a very different thing from holding that a State, upon whose laws a fraud has been practiced, is precluded from showing the fact, by a false recital in the record of a distant court, which recital was procured to be made by the same fraud.

Our attention has also been called to the recent case of *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, which is supposed to overrule a considerable number of former New York cases decided in harmony with the views I have here expressed. If it does overrule them, it is opposed to a very great weight of American authority, and I refer to the following cases in support of this opinion: *Barber v. Root*, 10 Mass. 260; *Hanover v. Turner*, 14 id. 227; *Lyon v. Lyon*, 2 Gray, 367; *Chase v. Chase*, 6 id. 157; *Smith v. Smith*, 13 id. 209; *Shannon*

v. *Shannon*, 4 Allen, 134; *Leith v. Leith*, 39 N. H. 20; *Pawling v. Bird's Ex'rs*, 13 Johns. 192; *Borden v. Fitch*, 15 id. 121; *Vischer v. Vischer*, 12 Barb. 640; *McGiffert v. McGiffert*, 31 id. 69; *Kerr v. Kerr*, 41 N. Y. 272; *Todd v. Kerr*, 42 Barb. 317. And see *Maguire v. Maguire*, 7 Dana, 181; *Ditson v. Ditson*, 4 R. I. 87; *Smith v. Smith*, 4 Greene (Iowa), 271; *Thompson v. State*, 28 Ala. 12; *Parish v. Parish*, 32 Ga. 653.

But in terms it overrules only the case of *Jackson v. Jackson*, 1 Johns. 424, in which the court held that the wife could not acquire a domicile separate from her husband—in which I agree that it erred—and also that the parties were not bound by a decree for alimony made between them in a case in which they had voluntarily appeared in another State—in which particular it is, perhaps, opposed to *Cheever v. Wilson*, above cited. In this regard I have no occasion to question, in the least, the case of *Kinnier v. Kinnier*. But some of the language of that case does not appear to me to have been weighed and considered with the attention which important cases usually receive in that learned court. The question arose upon demurrer to a complaint filed by one who had married a woman whose previous husband, it was alleged, had procured a divorce from her by collusion, in a State distant from that in which they resided. The purpose was to annul the second marriage. The complaint alleged that the first husband went to such distant State, in order to procure a divorce for a cause which would not be recognized in the State of his residence, and in order to evade the laws of that State; that the wife followed him, and by collusion the divorce was procured. The court held that this complaint did not show the divorce to have been invalid. It is said (p. 539): "The court had jurisdiction of the subject-matter of the action; that is, it had jurisdiction to decree divorces according to the laws of that State; and every State has a right to determine for itself the ground upon which it will dissolve the marriage relation of those within its jurisdiction. The court had also jurisdiction of the parties by the voluntary appearance of the defendant." With great respect, it appears to me there are several misconceptions in this statement. The "subject-matter of the action" was not the question of divorce in general, but was the marriage relation between the very parties to that suit; and that subject-matter neither was, nor could be within the jurisdiction of the court, if the parties had no domicile within the State from which the court derived its powers; for the

People v. Dawell.

obvious reason that the State itself, having no jurisdiction over the marriage relation between such parties, could confer none upon its courts. Furthermore, it is not true, that "every State has a right to determine for itself the ground upon which it will dissolve the marriage relation of those within its jurisdiction," if by this is included those who are only in person within its limits, but have their residence elsewhere. Will it be seriously claimed that any State might enact a law that citizens of other States might be divorced at pleasure in its courts, by simply applying in person for the decree? Would not every other State be likely to protest, with emphasis and indignation, that any such law was an invasion of their sovereignty, and an attempt, by indirect methods, to control the domestic relations of their citizens? But if such a law could not be valid, how can it be truly said, that a court, whose authority cannot possibly be broader than that of the State which created it, had "jurisdiction of the parties by the voluntary appearance of the defendant," when such voluntary appearance could no more bring the subject-matter of the suit within the jurisdiction of the court than in ejectment it could bring the land from a distant State, and enable the court to pass upon the right to its possession. The fallacy which runs through this New York decision, though not distinctly expressed, is, that divorce is a matter which concerns the parties only, and consequently they may carry the cause of action with them wherever they go, notwithstanding their domicile may remain unchanged. This fallacy, I trust, is sufficiently exposed in what has already been said.

The subject-matter of a divorce suit is just as much local as the subject-matter of a suit in ejectment. It is the *status* of the parties, permitted, regulated and controlled by the law of their domicile, which is to be passed upon and determined; and the appearance of the parties in a foreign jurisdiction does nothing whatever toward transferring this subject-matter. It cannot by any possibility be brought under the cognizance of a foreign court; and it is nothing less than an absurdity to ask of us to recognize and give effect to a decree of divorce granted abroad, by a court without authority, in evasion of our laws, and in fraud or contempt of our jurisdiction. To permit one of our own citizens who had obtained a decree of divorce abroad, to turn his wife out of doors in this State under it, would be scarcely less preposterous than to suffer a writ of possession to be executed in this State on a judgment in

ejectment rendered abroad. If, however, the absurdity of the case were its worst feature, the public would be less concerned with it than they are now; but we cannot shut our eyes to the fact, that these divorces are always fraudulent, are often obtained by perjury, in many cases are had secretly, and without any suspicion on the part of one party that such a proceeding is being taken, and that they tend, in defiance of our laws, to make marriage a mere provisional arrangement, which the parties may break up at will. Moreover, the foreign court has no power to make such provision for the wife and children as, in many cases, would be necessary to prevent their being thrown upon the charities of the world, and if it had, it would generally be kept in ignorance of the facts, and therefore incompetent to make such provision. Such circumstances are not exceptional; when residents of our State find its liberal divorce laws insufficient for their purposes, and resort to a foreign jurisdiction, it is generally because they seek to accomplish something which no court, fully possessed of the facts, could honestly grant, and to which, consequently, deception and fraud are essential, and in general, perjury also.

I think the exceptions are not well taken, and that the circuit court should be advised to proceed to judgment.

CHRISTIANCY, Ch. J., concurred.

CAMPBELL, J., delivered a dissenting opinion.

NOTE. — The foregoing decision, so far as it relates to the introduction of evidence to contradict the record in the divorce case, is sustained by the more recent decision of the United States Supreme Court in *Thompson v. Whitman*, which is given in full in the note to *Marx v. Fox*, 11 Am. Rep. 435. In that case it was held that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. See also *Hoffman v. Hoffman*, 7 Am. Rep., 299 (46 N. Y. 30), and the note thereto. — E.A.P.

LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY V.
PERKINS.

(26 Mich. 322.)

Carriers of live stock not common carriers — Burden of proof.

Action on the case against a railroad company, as common carriers, for refusing to carry and for delay in carrying live stock. *Held*, (1) that carriers of live stock are not ordinarily common carriers; (2) that the burden of proof was upon the plaintiff that defendant had assumed to convey the stock as common carriers or that they possessed the character of common carriers of live stock. (*See note, p. 282.*)

ACTION on the case. The opinion states the facts.

Warner Wing and *M. R. Waite*, for plaintiff in error.

A. L. Millard, for defendant in error.

GRAVES, J. This was an action on the case, against the plaintiff in error, to recover damages for an alleged refusal to carry, and a delay in carrying, certain live stock for the defendant in error.

The declaration contained three counts, and the portions material to the present inquiry were in substance as follows :

The first averred that the company were *common carriers* of goods and chattels for hire, from Clayton, in Lenawee county, in this State, to Buffalo, in the State of New York, and, as *such carriers*, engaged in the business of *carrying and transporting cattle, sheep, and hogs*, by railroad from the former to the latter place, and from and to other places on the line of their said road, in October, 1869; and it then sets up the delivery to the company, and their reception as *such carriers*, at that time, of certain cattle, sheep, and hogs of defendant in error, to be expeditiously, and with all reasonable dispatch, carried and conveyed by the company, as *such carriers*, to Buffalo, and there to be delivered to defendant in error, for certain reasonable reward to the company. That the company, not *regarding* their *duty as such carriers*, by carelessness and negligence, *delayed* the carriage for ten days, to the damage of defendant in error.

Lake Shore and Michigan Southern Railroad Co. v. Perkins.

The second count averred that the company, being, as stated in the first count, such *common carriers*, and engaged, as *such carriers*, in the business of transporting cattle, sheep, and hogs, and other goods, in and by said railroad cars, upon a railroad of the company, from Clayton to Buffalo, at the time stated in the first count, the defendant in error then solicited the company, as *such carriers*, to receive and convey for him, from Clayton to Buffalo, certain cattle, sheep, and hogs, belonging to him, and then offered to pay therefor the requisite price; but that the company, not regarding their *duty as such common carriers*, *refused to receive and transport* any of said property *within a reasonable time*, namely, ten days. It then further alleged that, after such refusal and lapse of time, the company, as *such carriers*, did receive the same cattle, sheep, and hogs, to be, expeditiously and without unreasonable delay, transported by them, as *such carriers*, to Buffalo; and then, not regarding their *duty as such carriers*, but, through their negligence and improper behavior, and said refusal, *unreasonably delayed* the arrival of the stock at Buffalo for twelve days, to the damage of defendant in error.

The third count averred that in March, 1870, the company, being such *common carriers* as theretofore stated, the defendant in error then offered to them, at Clayton, fifty neat cattle, belonging to him, to be carried by the company, for him, to Buffalo, and then and there offered to pay the company therefor the requisite price; but, not regarding their *duty as such common carriers*, they *refused to receive, or carry* said cattle, or any of them.

The plaintiff in error pleaded the general issue, and on the trial the jury returned a verdict against them, upon which judgment was entered. A bill of exceptions, containing all the evidence, having been settled and returned, the company complain of the proceedings on two general grounds: *First*, that the evidence had no tendency to prove that the company were common carriers of live stock; and, *Second*, that it was adapted to prove a case materially variant from that alleged.

In arguing these propositions, it was not disputed at the bar, that the company carried, and offered to carry, such property for hire, for all who would employ them; but the company contended that whatever they had done in that direction, and whatever offers they had made to do that kind of business, had been upon terms and

Lake Shore and Michigan Southern Railroad Co. v. Perkins.

conditions in derogation of material duties and liabilities belonging to common carriers, and in a different character.

The defendant in error, without denying that the conduct of the business, and the offer to conduct it, had been upon terms, and in a manner, excluding duties and obligations belonging to common carriers at common law, and without denying that these terms introduced relations, as to the management, care, and custody of the property carried, very different from those which arise between common carriers and customers, when other freight is in question and no special arrangement is made, insisted, nevertheless, that, as they carried generally for hire, for all who desired, they were common carriers of such property, and rightly, and in proper form, charged in that character. This position the plaintiff in error earnestly controverted.

In view of the points thus raised, it is needful to consider the legal import of the declaration, in relation to the subject-matter, and how the allegations require to be supported.

But, to guard against any misapprehension from the reasoning or language which may be employed, it is proper to premise, that the case does not require an opinion, nor shall we express any, upon the question, whether any modification of the common-law liability in the terms or conditions on which property of other descriptions is to be carried, will convert the carrier into a private carrier or bailee, as to all duties and risks incident to such carriage, or whether, or how far, the duties of common carriers may still attach as to all matters not covered by the modification, or how extensive such modifications must be to take the case entirely out of the law of common carriers. It may, or may not, be true, in any particular case, where the duties imposed upon common carriers at common law have been modified by agreement, that, in all other respects not covered by such modification, the carrier's liability, under a proper declaration, describing the undertaking or duty as modified, would properly be governed and measured by the common-law liability. But the declaration must describe the undertaking or duty as it is. A plaintiff cannot declare upon one undertaking, or duty, or obligation of the defendant, and recover upon another. In the *Mich. S. & N. I. R. R. Co. v. McDonough*, 21 Mich. 166 (4 Am. Rep 466), we held that railroad companies were not, by the common law, common carriers of live stock, and could only make

themselves common carriers of that species of property, by assuming to convey it as common carriers.

In this case the action was founded on the general obligation of the law of common carriers and its infringement, and not upon a contract and its breach.

The company are alleged to have been common carriers of live stock, and to have made themselves liable in that specific character, through omissions of duties, and violations of obligations, involved in that character. The asserted cause of action, and the form and nature of the allegations, therefore, necessitated proof that the company *possessed the character* of common carriers of live stock; and there being no enactment applicable to the company, and adapted to produce any change in the duties and obligations of carriers of that kind of property, was the character so imputed provable by the evidence adduced? Could it serve to show this character, to prove that, on terms, as to duties, liabilities, and relations, not recognized by the law of common carriers, but in some respects variant, and in others repugnant, the company had carried, and still offered to carry, living animals for hire, for all who desired? If the facts indicated by this query were before us on special verdict, could we say that they made the company common carriers of live stock? I apprehend not. While it is true that a common carrier, in the language of Judge PARKER (*Dwight v. Brewster*, 1 Pick. 50; 2 Pars. on Cont. 163), "is one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place," it is a mistake to suppose that *every* one who so acts is *necessarily* a common carrier, or that no party can so conduct without being a common carrier.

The common law is not so harsh, or meddlesome, or so unreasonable in its bearings upon the freedom of business, as to make the carriage of property for hire, from place to place, for all such as may choose, *only possible* upon the *condition* that the carrier shall incur all the duties, obligations, and liabilities of a common carrier. On the contrary, there is no room for doubting that one may lawfully engage and carry on this business of transporting property for hire, for all who wish, under such terms and regulations as to clearly negative the assumption of the character of common carrier, and many cases could be imagined in which a carrier might do all the definition expresses in terms, and still not be a *common carrier*.

In order to apprehend the true common-law idea of a common

Lake Shore and Michigan Southern Railroad Co. v. Perkins.

carrier, and ascertain the import of the allegations in the declaration, the definition of Judge PARKER must be read with all the common-law duties and obligations implied or understood. For a common carrier, without these duties and obligations, is, in legal contemplation, quite impossible. They are a part of the character, and cannot be severed from it. And where only a portion of them are assumed, the common-law conception of the character is not satisfied. It is not enough that the capacity exists to incur these duties and obligations. They must be actually assumed or contemplated, so as to apply, according to their nature, to events as they arise.

If, then, the common carrier has the distinctness and identity of character supposed, and if, to become invested with that character in its entirety according to the common law, he must become subject to the whole group of what are called his "common-law duties and obligations," it follows, that the declaration in the case must be held to have charged the company in that character, and to have alleged that they were subject to all those duties and obligations.

Admitting this conclusion to be correct, the defendant in error was bound to prove that the company were common carriers of live stock in the definite sense of being subject to all the duties and obligations belonging to the employment according to the common law.

The liability could only be shown by proving the existence of those conditions on which it was made to depend by the nature and form of the allegations. When a limited responsibility is legally contracted for, the bailee is not a common carrier in that case, in the full common-law sense, but a private carrier, or a bailee of another class, or a common carrier *sub modo* only. *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 485; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *York Company v. Central Railroad*, 3 Wall. 107; *Farnham v. Camden & Amboy R. R. Co.*, 55 Penn. St. 53.

In construing the facts, and ascertaining their legal incidents and requirements in such special cases, the principles applicable to common carriers may sometimes, and in some particulars, perhaps, furnish correct analogies or principles of decision. But as duties and liabilities indispensable to the character of the common carrier are excluded, the bailee cannot, with legal propriety or consistency, be ranked as a common carrier, or charged in the ordinary form in case, upon the mere legal obligations of one.

Lake Shore and Michigan Southern Railroad Co. v. Perkins.

It would be contrary to every proper idea of justice and legal procedure, in the face of a reasonable and regular objection, to cast a party in damages for having violated the duties of one character, where the action against him is grounded exclusively upon the legal obligations due to another, and essentially different, character.

Now, it must be admitted as settled law, that where one has already assumed the character of common carrier, he may, in special cases, by express agreement, exclude particular common-law duties and liabilities, and that, when this is done, his common-law character as common carrier, will be cut short, at least to the extent of the variation made by the agreement; and if such is the consequence of an agreement limiting his liability, by one already a common carrier, it seems reasonable to conclude, that one who has never assumed or offered to carry chattels of a certain class, except upon special terms exempting him from all the important duties and liabilities of the common carrier, cannot be classed among common carriers of property of that kind, or be made amenable in the character of a common carrier, as to such property.

Without pursuing this topic further, I am of opinion that the plaintiff was required to show that the company were common carriers of the kind of property mentioned, and moreover, that this was not provable by evidence that they only carried, or offered to carry, on special terms and with limited duties and liabilities.

The character required to be proved, and that shown by such evidence, is radically different, and, as the character of common carrier is not involved in that of a private carrier, or of an ordinary bailee for hire, the facts which prove the latter will negate the former, where, according to the case, there can be but *one* of these characters. It was plainly apparent, from the course of argument for defendant in error, and from his brief, that he justly considered that, neither the evidence as a whole, or any part of it, would allow him to deny that the company, in carrying and offering to carry live stock, kept themselves exempt from the most important duties and liabilities of common carriers, and a review of the record shows that, respecting this matter, there was no conflict in the evidence, and that all of it had the same drift. It went to prove that the company had long acted, and still offered to act, as *private carriers* of live stock, or in a somewhat analogous character; but it had no tendency to prove that they had been, or proposed to be, *common carriers* of it. Regarding this point, the evidence is unmistakable.

•

Lake Shore and Michigan Southern Railroad Co. v. Perkins.

Instead of conducing to prove that the company were common carriers of such property, it went to show that, in handling and offering to handle it, they acted, and offered to act exclusively in a character distinctly different and removed from it. And in the treatment of this aspect of the case, the argument for defendant in error is again noticeable. It was not directed to find in the record any evidence denoting that the company carried live stock subject to the range of duties and liabilities, and with the rights of custody, control, and management, belonging to common carriers; but was discreetly aimed rather to maintain that the case did not require such evidence.

Under these circumstances, I do not deem it needful to restate the evidence, or pause to explain detached portions of it. I think it varies in no substantial respect, in reference to the main question, from that given in *McDonough's Case*, before referred to. And there it was held, upon a critical examination, that the evidence did not tend to prove that the railroad company held themselves out as common carriers of this kind of property, or that they undertook in such character to carry the stock there in question.

If the conclusions which have been reached are correct, the court erred in refusing to give the instruction first prayed by the plaintiff in error, and a new trial must be ordered.

As the exceptions to rulings touching the admission of evidence were abandoned on the hearing, the elaborate and pertinent opinion in *McDonough's Case*, in connection with the explanations now given, seems to make any further discussion on this record unnecessary.

Before taking leave of the case, however, it may be well to advert to *Mich. Central R. R. Co. v. Hale*, 6 Mich. 243, and *Great W. Ry. Co. v. Hawkins*, 18 id. 427, which were cited on the argument as authority for the position of defendant in error. It is quite true that particular passages of the opinion in the first of these cases are directly opposed to the views now announced. But an examination will show that the expressions quoted were merely the individual notions of the judge who gave the opinion, and were not delivered as the utterances of the court, or considered as essential to the determination, or as at all requisite in reasoning to the result. We cannot, therefore, consider those expressions as authority, or as having any peculiar force to bind or direct our judgment in the case before us.

In the second cause above mentioned, it was not our purpose to

Lake Shore and Michigan Southern Railroad Co. v. Perkins.

attempt a settlement of the law on the points now directly made. Nothing of that kind was called for, and the opinion given was not intended to go beyond the requirements of the case. At the instance of the plaintiffs below we had reversed the judgment given by the circuit court on the first trial; and this we could not have done if the company had shown us that the case proved was materially variant from the case alleged; since it would have appeared, in that event, and for that reason, that the plaintiffs below were not entitled to recover, and were, consequently, not prejudiced by the rulings they complained of. But the company gave no such answer to the objections raised against the judgment below. They did not suggest it at all, but, tacitly waiving it, they allowed the exceptions to be decided without any reference to the question of variance, and submitted to our judgment, requiring a new trial. The new trial so ordered being had, the same facts substantially as to the point of variance were brought out which were shown on the first trial, and, therefore, when the case came again before us, and the company for the first time insisted that there was a variance, the vital question in that regard was, not whether such objection was, in the abstract, well or ill founded, but whether we ought, in the attitude of the case, and in view of the antecedent circumstances, to reverse again, and on a ground which stood constructively ruled against the company, on their theory of the pleadings and evidence, by our first decision, and we thought we ought not to do so.

The subject is more fully explained in *McDonough's Case*, before cited, and needs no further comment.

I am, therefore, of opinion that *G. W. R. W. Co. v. Hawkins* does not stand in our way, and that the judgment under review should be reversed, with costs, and a new trial ordered.

NOTE. — See *Kansas Pacific Railway Co. v. Nichols*, post, wherein the supreme court of Kansas holds that carriers of cattle are common carriers, except so far as they limit their liability by special contract. — RHP.

Don Moran v. People.

DON MORAN v. PEOPLE.

(25 Mich. 356.)

Rape — force — intercourse procured by fraud.

On the trial of an indictment for rape the jury were instructed that they might convict if they found that defendant procured the woman to have connection with him by fraudulent representations, which she believed that it was a necessary part of his medical treatment of her. *Held*, error, for the reason that it did not recognize force as an essential element of the crime. (*See note, p. 290.*)

INFORMATION for rape. The opinion states the case.

H. H. Saunders, S. Larned, and F. A. Baker, for plaintiff in error

Dwight May, attorney-general, for people.

CHRISTIANCY, C. J. Plaintiff in error was tried in the recorder's court of the city of Detroit, upon an information charging him with having committed a rape upon Frances Jackson, a female of the age of ten years and more, to wit : of the age of sixteen years. The information was in the usual form, that he did ravish and carnally know the said Frances by force, and against her will.

The bill of exceptions is as follows :

" And on said trial, The People to maintain the issue on their part introduced evidence which tended to prove, that the father of the complaining witness, shortly before she was sixteen years of age, brought her to the house of the defendant, in Detroit, to be treated for consumption, the defendant claiming to be skilled in the treatment of diseases of that kind ; that her father left her at defendant's house ; that the defendant made an examination of her, and after such examination, told her that the ' whites ' had collected in her stomach ; that she was ulcerated ; that her uterus was inverted ; that to save her life it would be necessary to enlarge her ' parts,' so that the ' whites ' might pass off, to break the ulcers, and to turn the uterus ; that he could do this with instruments, but the operation would probably kill her ; that the only way would be for

him to have carnal connection with her ; that when she objected, he told her that it was what he did to all women who came to be treated by him ; that he had told her father that it would be necessary, and he understood all about it, and had authorized the defendant to have connection with his daughter ; that she, relying upon these representations, and believing them to be true, permitted the defendant to have connection with her ; that if it had not been for such representations she would not have yielded ; and that the said representations were false, and known by the defendant to be so.

"The defendant, to maintain the issue on his part, introduced evidence tending to rebut that given by the prosecution.

"The court charged the jury as follows:

"'If you find that the defendant represented to the complaining witness that, as a part of his medical treatment, it was necessary for her to have carnal connection with him ; that such representations were false and fraudulent ; that she believed it, and relying upon it, consented to the solicitations of the defendant, and had connection with him ; and that such representations were made for the purpose of inducing her to give such consent, and that without it she would not have yielded, the defendant is guilty of the crime charged against him.'

"'If the complaining witness did not believe the representations ; was not deceived by them ; or had sense and intelligence enough to know better than to believe them ; or by the reasonable exercise of such faculties as she has, might have known better, and that the act was wrong, the defendant is not guilty.'

"To said charge, and each and every part thereof, the defendant then and there excepted."

It will be noticed that this charge leaves out, and wholly ignores, all idea of force as a necessary element of the crime charged ; and the jury were, in effect, told that the defendant might be found guilty of the rape, though he neither used, nor threatened to use, any force whatever in case of her refusal, and though she might have assented without any constraint produced by the fear or apprehension of force, or any dangerous, or serious, consequences to herself, if she refused or resisted.

This feature of the charge is assigned as error, and presents the only question raised in the case by the plaintiff in error.

The definition of rape, as generally given in the English books,

Don Moran v. People.

is, that "rape is the unlawful carnal knowledge, by a man of a woman, forcibly (or by force), and against her will." 3 Coke's Inst. (Thomas' ed.) 549; 1 Hale's P. C. 628; Hawkin's P. C. (Cur. ed.) 122; 4 Bl. Com. 210; 1 Russ. on Cr. (Greenl. ed.) 675. This definition depended, perhaps, partly upon the common law, but mainly upon two early, and rather loosely worded, English statutes, one of which (Stat. Westm. 2, chap. 34) expressly made force an element in the crime, if the party were attainted at the king's suit (though not when the proceeding was by appeal), and the other (Stat. Westm. 1, chap. 13), which did not require force as an element, except as it might be inferred from the word "ravished." See 2 Bish. Cr. L. §§ 1067 to 1069, where the substance of these statutes is given. And, as remarked by Mr. Bishop (2 Bish. Cr. L., § 1073), the more correct definition to be gathered from these statutes would have been, "Rape is the unlawful carnal knowledge, by a man of a woman, by force, when she does not consent." The difference between the two definitions, however, would seem to be important, only in cases where the female with whom the connection is had may be said to have no will, as in the case of an idiot, or insane person, or one in a state of unconsciousness, in which cases, if anywhere, the force necessary to accomplish the act itself, without resistance, could possibly be held to constitute the force contemplated by the definition of the offense. See *Rex v. Ryan*, 2 Cox's C. C. 115; *Reg. v. Fletcher*, Bell's C. C. 63; *Reg. v. Camplin*, 1 Den. C. C. 89. But this particular class of cases has no special bearing upon the case now before us (and we do not discuss it); nor are we embarrassed by any uncertainty in the definition of the offense.

Our statute has adopted substantially the definition first above given from the English authorities. Section 5730, Compiled Laws of 1857, declares, "If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, * * he shall be punished," etc.

In the interpretation of this statute it is clear, that the terms, "by force," must not be wholly rejected or ignored, but that *some effect* must be given to them; and the language of the provision certainly requires something more to be shown than if these words had been omitted; and it is equally clear that if that particular kind and amount of force only is required which is always essential to the act of sexual connection itself, when performed with the assent of the woman, then no effect whatever is given to the terms,

"by force," but the interpretation and the effect of the statute will be precisely the same as if these words were not contained in it. This interpretation, therefore, is not permissible. Some effect must be given to the words; and such has been the almost, if not entirely, uniform course of decision, both in England and in this country, where the definition of the offense is substantially the same as that given by our statute, when the charge has been for the actual commission of the rape upon a female of the age of proper discretion, of sound mind, and in full possession of her faculties, however fraudulent the means, or false the pretenses, by which her consent was procured. I have not been able to find a single well-authenticated case, where the question was directly raised, in which it has been directly decided the other way.

- The anonymous case cited in the note to 1 Wheeler's Cr. Cases, 381, and referred to by Mr. Wharton (Cr. Law, § 1144), and by Mr. Bishop (2 Cr. Law, § 1080—to the effect, that force is not necessary in the commission of rape, but that stratagem may supply its place—is stated as a mere rumor of a decision made at Albany by Chief Justice THOMPSON, and as very properly remarked by the court in *Walter v. The People*, 50 Barb. 144, "loose statements of this kind
- are entitled to no consideration whatever." In *State v. Shepard*, 7 Conn. 54, the woman was asleep and did not discover the fact until defendant had violated her person; and her first impression was that it was her husband; as soon as she awoke and became sensible of the situation he sprang from the bed. The charge was for assault with intent to commit a rape. The prisoner's counsel contended that, if there was any carnal knowledge obtained, it was a rape, and the prisoner could not be convicted of the mere assault with intent, etc., as the less offense was merged in the greater. The only question discussed was, whether proof of a rape would sustain an indictment for an attempt to commit it; and as very properly remarked by the counsel for plaintiff in error in the case before us, the counsel for the prisoner in that case overlooked a good defense in the attempt to maintain a frivolous one. The case of *Regina v. Stanton*, 1 O. & K. 415, has been sometimes cited as sustaining nearly the same doctrine as that cited from the note to Wheeler's Cr. Cases. But it was the case of an indictment for an assault with intent to commit a rape, where the prisoner, a physician, had obtained access to the person of the woman under pretense of administering an injection, and commenced to have carnal connection

Don Moran v. People.

with her, when she, discovering it, got up and ran out of the room. This was clearly an assault, and the only question was, whether the intent existed as charged. As it did not appear that the prisoner had intended to use force, in case of resistance, it was, of course, but an assault only, and was so held by the court; but when the court say, that, if that intent had appeared, it would have constituted the completed offense of rape, they express an opinion upon a question not in the case. This is not only the case in which it seems to have been obscurely shadowed forth, that, when the defendant has succeeded in obtaining the connection without force, actual or threatened, and without resistance, by falsely personating the husband, the mere intent to use force, had it become necessary to accomplish his purpose, would satisfy the requirement of force involved in the definition of rape (see *Rex v. Jackson*, Russ. & Ry. C. C. 487); and a similar idea seems to have been obscurely intimated in some American cases. But with all deference, I must be allowed to suggest, whether it has not resulted from confounding two distinct offenses — the completed offense of rape, and the attempt, or an assault with the intent to commit it. And I am compelled to say, I am wholly unable to discover how the intent to resort to force in such cases, when it is not in fact either resorted to, or in any manner threatened, can be at all material upon the question, whether a rape has been committed, or how such intent, never brought to the notice of the woman by word or act, can satisfy the requirement of force in the legal definition of the offense; and such, I think, is the prevailing view of the English courts (see, among other cases, *Reg. v. Saunders*, 8 C. & P. 265; *Reg. v. Williams*, id. 286; *Reg. v. Clarke*, Dears. 397; *Reg. v. Fletcher*, Law Reports, 1 Cr. Cases Reserved, 39; 14 Law T., N. S., 573; 12 Jur., N. S., 505) as well as of the American courts; though such intent would, of course, constitute a necessary and controlling element in a charge for an assault with intent to commit a rape, though in no way communicated to the intended victim.

But if we admit that the intent to resort to force, if required to accomplish the criminal purpose, in a case like the present, would, though never used or threatened, constitute the transaction of a rape, this would not sustain the charge in the present case, which did not even require the existence of such intent.

The true rule as to force in cases of rape generally was recognized by this court in *People v. Valentine Cornwell* (not *Croswell v. The*

Don Moran v. People.

People, as printed in the report), 13 Mich. 433, where it was said that "the essence of the crime is not the fact of intercourse, but the injury and outrage to the feelings of the woman by means of the carnal knowledge effected by force." And there being no force used or threatened in that case, but strong grounds for believing that the woman was the soliciting party, the connection was properly held not to constitute rape, though the woman was not of sound mind, and had no intelligent understanding at the time the act was committed, but was in good physical health. In cases where the woman is entirely insensible from idiocy, or from the effect of drugs administered (though the point is not here involved) it may be entirely right to hold a very slight degree of force sufficient; and that amount of force which, in such cases, would always be necessary, beyond what would be required with a consenting party, might, perhaps, properly be held, as it sometimes has been held, sufficient to make the transaction a rape, as suggested by my brother COOLEY in *People v. Cornwell*, *ubi supra*.

And when drugs are administered, or procured to be administered, by the criminal, for the purpose of taking away or lessening the power of resistance, and having that effect, there may be no ground for distinction between the force thus exerted by him through the agency of the drugs, and that directly exerted by his hand and for the same purpose.

The only question really involved in *People v. Cornwell*, above cited, was whether, under the circumstances of that case, the defendant could be held guilty without proof of force in any form, actual or threatened, and it was, I think, properly held by us that he could not. But after disposing of this, the only question in the case, an intimation was thrown out—for which I admit, and claim, a full share of the responsibility—that when a woman's consent is obtained by fraud, she at the time supposing the man to be her husband, the connection thus obtained may constitute rape. No such question was involved or argued; and we suppose it to be well understood by judges and the profession, that intimations and suggestions of this kind, in no way necessary to the decision of the case, are not always, or generally, as carefully considered and examined as the questions upon which the case itself turns; and hence the familiar rule, that judicial opinions are to be considered as authority, and construed, only *secundum subjectam materiam*.

If the statute, or the definition of rape, did not contain the words

Don Moran v. People.

"by force" or "forcibly," doubtless a consent procured by such fraud as that referred to might be treated as no consent; but the idea of force cannot be thus left out and ignored, nor can such fraud be allowed to supply its place, though it would doubtless supply, and satisfy, all the other terms of the definition; and, so far as the intimation in question is to be understood as going further and dispensing with all idea of force, it must be understood as an intimation of the court of what, in their opinion, the law ought to be, rather than what it is. And, upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman, or by a physician fraudulently inducing a female patient to believe such connection essential to a course of medical treatment, must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force or any apprehension of violence; and it might, and in my opinion would, be judicious for the legislature to make some provision for punishment in cases of this kind. But it is not for the judiciary to legislate, by straining the existing criminal law to bring such cases within it.

For the reasons given, I think the judgment of the recorder's court should be reversed, and a new trial awarded.

And with reference to a new trial, it is proper for the guidance of the recorder's court, to consider the nature of the evidence set forth in the record, and which will probably appear upon the new trial, and to determine what charge the state of facts would warrant; or, whether there was any thing in the evidence which would authorize the jury to find that the carnal connection was obtained "by force, and against the will" of the party injured.

We think it is well and properly settled that the terms, "by force," do not necessarily imply the positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection; but that force or violence threatened as the result of non-compliance, and for the purpose of preventing resistance, or extorting consent, if it be such as to create a real apprehension of dangerous consequences, or great bodily harm, or such as in any manner to overpower the mind of the victim so that she dare not resist, is, and upon all sound principles must be, regarded, for this purpose, as in all respects equivalent to force actually exerted for the same purpose. See *Reg. v. Hallett*, 9 C. & P. 748; *Reg. v. Day*, id. 722; *Wright v. The State*, 4 Humph. 194; *Pleasant*

v. *The State*, 8 Eng. 360; and see *Strang v. The People*, 24 Mich. 1. Nor, as appears by the case last cited, need the threats be of force to be used in accomplishing the act; as in that case the principal threat was, that if she refused he would take her away where she could never get back. In fact, we think the terms of the statute in reference to force are satisfied by any sexual intercourse to which the woman may have been induced to yield, only through the constraint produced by the fear of great bodily harm, or danger to life or limb, which the prisoner has, for the purpose of overcoming her will, caused her to apprehend, as the consequence of her refusal, and without which she would not have yielded.

It remains only to apply these principles to the present case.

Considering the way, and the purpose for which, the girl had been placed by her father under the care and treatment of the defendant, as her physician, the evidence had a tendency to show, and the jury might properly have found, that the girl was induced by the defendant to submit to the sexual intercourse with him, from the fear and under the apprehension, falsely and fraudulently inspired by the defendant for the purpose of overcoming her opposition, that, if she did not yield to such intercourse, he intended to, and would, use instruments "for the purpose of enlarging the parts," and that such operation with instruments would be likely to kill her. And if the jury should so find—with or without the other facts submitted to them by the charge given—and that she would not otherwise have yielded, it would be their duty to find the defendant guilty of the crime charged.

The judgment must be reversed, and a new trial awarded.

CAMPBELL, J., concurred.

COOLEY, J. As my brethren are agreed in this case, I concur in the result, while not fully assenting to all that is expressed in the opinion.

GRAVES, J., did not sit in this case.

NOTE.—In *Reg. v. Case*, 19 L. J. M. C. 174; 1 Den. C. C. 580; 4 Cox's C. C. 220, it was decided that if a surgeon professing to take steps to cure a girl of a complaint has carnal connection with her, and she is ignorant of the nature of his act and makes no resistance, solely from a *bona fide* belief that he is as he represents, treating her medically, with a view to her cure, his conduct amounts to an assault. To constitute a rape on a woman conscious and capable of giving consent at the time, there must be an actual resistance of the will—non-resistance to connection, permitted under a misapprehension induced by the conduct of the man, by a woman conscious and capable of

 Voorhies v. Frisbie.

consenting, amounts to consent, though unintentional, and prevents the offense amounting to rape. *Reg. v. Barron*, 38 L. J. M. C. 20; 1 L. R. C. C. 156; 11 Cox's C. C. 191. It was said in *Reg. v. Stanton*, 1 Car & Kir. 415, where the patient was directed to lean forward for the purpose of receiving an injection, and where sexual intercourse was then attempted, that the defendant was guilty of an assault. See *Walter v. People*, 50 Barb. 145.

Commonwealth v. Burke, 7 Am. Rep. 531; 105 Mass. 376; the supreme court of Massachusetts held a man guilty of rape for having connection with a woman without her consent, while she was drunk and insensible. The opinion presents a very elaborate examination of the essentials of rape.

In New York, under 2 R. S. 663, § 23, having carnal connection with a woman intoxicated to the point of insensibility, forcibly, is not rape, but is merely an offense against the person. To constitute the crime under that statute the connection must be absolutely against the will of the female. *People v. Quin*, 50 Barb. 123.

But in *Reg. v. Mayers*, 12 Cox's C. C. 311, it was held that if a man has or attempts to have connection with a woman while she is asleep, it is no defense that she did not resist, as she was incapable of resisting, and that the man can therefore be found guilty of rape or of an attempt to commit a rape.

In *Strang v. People*, 24 Mich. 1, it was held, that to warrant a conviction for rape, the jury must be satisfied that the connection was had by force and against the will of the prosecutrix, and that there was the utmost reluctance and resistance; or that her will was overcome by fear of the defendant, and that the terror of his threat was so extreme as to preclude resistance. In that case the prosecutrix testified that the defendant had threatened her and that she did not resist because of extreme fear, and a conviction was sustained. — RRP.

 VOORHIES V. FRISBIE.

(25 Mich. 472.)

Bankruptcy — jurisdiction of State court of suit by assignee.

A State court has no jurisdiction of a suit by an assignee to set aside a conveyance made by a bankrupt, in fraud of the bankrupt act.

BILL in equity filed by William T. Voorhies, assignee of William C. Bennett, a bankrupt, against Abijah H. Frisbie and another. The opinion states the case.

Spaulding & Cranson and D. G. Holbrook, for complainant.

Waldridge & Selden, for defendants.

CAMPBELL, J. The bill in this cause was filed by an assignee in bankruptcy, to set aside a conveyance alleged to have been made by the bankrupt in fraud of the bankrupt act. By some apparent

misunderstanding, the defendants' default was taken, and the circuit court, acting within a discretion which we cannot review, refused to open it. The case, therefore, comes before us on the sufficiency of the bill.

The bill would be fatally defective under any circumstances not dependent on the bankruptcy proceedings. It is not only entirely lacking in direct allegations which would make out a fraud against creditors, but it does not show that any creditor had taken such steps as would, apart from the bankrupt law, give him any right to complain of the fraud, if existing. The only question presented is, whether the assignee in bankruptcy could resort to the circuit court of Clinton county to obtain relief against a conveyance alleged to have been made in fraud of that statute.

It cannot be questioned that the bankrupt law is as binding in one court as in another, and a title obtained by valid proceedings under it must be respected. In private hands it would be, like any other vested right, enforced in any court having cognizance of such property rights, without any necessary regard to its origin, as a land title derived from a patent, for purposes of jurisdiction, stands on the same footing in all courts, in real actions, with a private grant or inheritance.

But the right of an assignee in bankruptcy to apply to a State court to have a conveyance set aside as fraudulent is claimed by defendants to stand on different grounds, and we think correctly.

The fact that the fraud charged is not a fraud against our State laws, is not decisive. It is not uncommon to seek redress in a forum where parties can be found, for actual frauds committed elsewhere, not being merely statutory. And as the bankrupt law must bind all tribunals in this country, acts committed against it could not be recognized as lawful, whether affirmative relief could be granted against them or not. The difficulty arises from other considerations, involving the danger of a conflict of jurisdictions, if State courts should attempt to adjudicate upon the peculiar class of cases to which the present controversy belongs. Upon cases not involving similar difficulties we express no opinion.

By the first section of the bankrupt act, the courts of the United States are vested with very full and complete jurisdiction, not only to determine the liabilities of the bankrupt, but also to try the conflicting claims of all parties, debtors and creditors, to provide for collecting all the assets, ascertaining and liquidating all liens, and

regulating every thing necessary to be done in the premises until the proceedings are closed. The second section also makes express provision for suits at law, or in equity, brought by the assignee against any person claiming an adverse interest.

In *Ex parte Christy*, 3 How. 292, the plenary power of the courts of the United States, under similar authority of the bankrupt law of 1841, was very thoroughly discussed, and in some cases, at least, jurisdiction was asserted, to control parties litigating in State courts; an interference not lawful in ordinary cases, and which depends on the exclusive character of the bankruptcy power, vested in the general government under the constitution. No express decision was made as to whether the jurisdiction of the United States was exclusive, and in a subsequent case, in the same volume that point was also reserved. *Norton's Assignee v. Boyd*, 3 How. 426. It would make no great difference in those courts whether action should be had in the State courts or not, when they have so large a control over the litigants as practically to reach the proceedings. But it is a very serious question, whether an independent court can be said to have jurisdiction, when subject to such interference; and quite as serious a question, whether it is proper to exercise it, if theoretically existing.

It cannot be doubted, that there is power in congress to make jurisdiction exclusive over suits arising under the laws of the United States, where the proceeding is a direct one to enforce peculiar rights originating under the statute, and not within any other law. The right to assail the conveyance in question is purely statutory, upon the case made by the bill. It is also in the nature of a penal enactment, in creating a forfeiture and disability enforceable in favor of the assignee. It is generally understood to be settled law, that no court will take jurisdiction for the sole purpose of enforcing the penal consequences imposed by any other authority which has its own courts to enforce them. *The Antelope*, 10 Wheat. 67. It was held in *Gelston v. Hoyt*, 3 id. 246, that a State court cannot lawfully assume any such jurisdiction under the laws of the United States. In those cases where it is loosely said there is a concurrent jurisdiction over certain crimes, it is only because the same act may violate the laws of both jurisdictions. Thus, in *Fox v. Ohio*, 5 How. 410, it was held that passing counterfeit money might be thus punishable, but it was never supposed that a State could punish it under an act of congress, or as any thing but a State

offense. We have refused to enforce the penalties of foreign usury laws not avoiding the contract, although if the contract was absolutely void where made, it would not be held valid anywhere. *Collins Iron Co. v. Burkam*, 10 Mich. 283. And thus far, at least, the penalties and disabilities under the patent and copyright, and navigation, laws have not been understood to fall within the cognizance of State courts, although the language giving jurisdiction to the courts of the United States is no more exclusive than that of the bankrupt law. Yet contracts concerning the transfer of such property are cognizable in all courts, like other property contracts.

We think the purpose of the present action is directly to aid in the administration of the estate of the bankrupt, and that the bankrupt law regards these proceedings as a part of the course which should be within the control of the courts having jurisdiction under the statute. If a State should affirm the title of the defendants, and deny the claim of the assignee, there is no appellate resort except to the United States supreme court. If we have jurisdiction, our judgment must be valid till reversed. But it can hardly be supposed that it was designed that summary proceedings should be subject to such long delays, and that the settlement of the estate should be retarded by resort to courts of another jurisdiction. The inconvenience of such a course has, we think, a decided bearing upon the construction which the statute itself requires. If this bill had been filed by defendant to quiet title against the assignee in bankruptcy pending bankrupt proceedings, the want of jurisdiction would not be disputed.

The conditions on which State courts can, in the absence of any distinct restriction, exercise concurrent jurisdiction with courts of the Union, have never been clearly defined, and perhaps cannot be. So far as any general doctrine is laid down, it seems to indicate that State courts may, where not otherwise restricted, exercise jurisdiction over cases where they might have done so independent of the constitution and laws of the United States, but that they can exercise no new powers wholly dependent on, and conferred by, statutes of the United States. 1 Kent's Com. 397. Or, as well expressed by the supreme court of Massachusetts, "the jurisdiction is in such case exercised, not upon the ground of a judicial authority conferred as such by a law of the United States, but as the ordinary jurisdiction of the State court; acting indeed, in the particular case, upon legal rights which may have been created, or materially affected, by

the legislation of congress." *Ward v. Jenkins*, 10 Metc. 583. This case also distinguishes between the right to sue upon contracts and other rights in common-law form, and the right to enforce statutory penalties and disabilities, which it holds not within State authority, and cites cases on the subject.

We do not deem it necessary to consider, for the purposes of this case, to what extent assignees may sue at law on the same footing, and with the same rights as private persons, to recover upon contracts or legal liabilities, or in equity, to enforce such liens and obligations as involve the same kind of interests. No such difficulties would arise at law as may arise in equity, and it may be there are classes of equitable proceedings which could raise no complications. The present case is one where no cause for equitable interference could exist in this State, in favor of private parties, upon the facts alleged. No creditor who has not obtained a lien or judgment, and who has not, in seeking to enforce that lien or judgment in the ordinary way, found it necessary to assail the conveyance of his debtor's property as fraudulent, can complain of it. And a transfer for a valuable consideration, and in good faith, though made by a person known to be insolvent, would not, in the absence of a bankrupt law, be necessarily void as against any one; as it would not necessarily impair the rights of creditors. Our laws have never prohibited honestly-made preferences. The rights of assignees under the bankrupt law rest largely on new and purely statutory grounds. And where a sufficient power exists in the courts of the United States, not only to enforce those rights, but to do it more conveniently and effectually, in connection with the administration of the whole estate, there is no necessity, and we think no propriety, that we enlarge our own jurisdiction to interfere directly in matters beyond our full control.

The peculiar advantages of equity jurisdiction depend almost entirely on the power of courts of equity to do full justice by a complete control over the matters in controversy, directly, or by personal coercion of the parties. The rule is almost universal, that no interference will be exercised unless this complete power exists to compel justice to be done throughout. Specific performance, which is one of the commonest forms of relief, will seldom be granted where there is not a mutual liability to the jurisdiction, or where the court has not the means of seeing that its decree shall be carried out. It will not entertain a bill where it could not obtain the means of

enforcing a cross-bill, if one should become proper, so as to compel both parties to do equity. In maintaining jurisdiction in favor of a foreign State, in *U. S. of America v. Wagner*, L. Rep. (2 Ch. Ap.) 582, the English court of chancery maintained the jurisdiction, with the express assertion that, in case a cross-bill should be filed, proceedings should be stayed until the complainant in the original bill should submit to it. And in *U. S. of America v. McRae*, L. Rep. (3 Ch. Ap.) 79, the principle was further recognized, that equities connected with the matter in controversy were entitled to be enforced. This doctrine is elementary, and is incident to equity jurisdiction.

In all controversies concerning conveyances alleged to have been made in fraud of creditors, it is competent, and generally necessary to inquire into consideration and notice; and, under the rule in this State, there may be many cases where purchasers, not entitled to hold the entire title, may be protected in their partial payments, and authorized to demand repayment of moneys, and cancellation of securities; and, in some cases, to ask reconveyance of property, or re-assignment of obligations. There may also be a right to an accounting.

There certainly can be no jurisdiction in a State court to deal with a fund in bankruptcy, and direct the course to be taken by the assignee; and the assignee would have no power, in some cases at least, to submit himself to such a jurisdiction. There are some arrangements which he can make, with the leave of the bankrupt court, but not without. His powers and duties, as prescribed by the bankrupt law, would not permit any but the courts taking jurisdiction under the statute, to adjust all the equities by compulsion.

This, we think, is a conclusive objection to entertaining jurisdiction in such suits as the present, if the jurisdiction could properly be said to exist. But it would be a misnomer to speak of such a jurisdiction as existing, and yet not plenary. The constitution of our courts of equity gives them no such hampered powers; and it would not be promotive of justice, if these limited powers had been given. They could not disregard the bankrupt law, without violating their legal duty, and they have not the means of controlling proceedings under it, which are necessary to prevent injustice otherwise resulting from the application of single clauses, or the separation of transactions, where all need to be administered by one set of tribunals.

People ex rel. Hedgman v. Board of Registration.

We think the court below erred in granting a decree, and that the decree should be reversed, with costs of both courts, and the bill dismissed without prejudice to such other proceedings as complainant may be advised to pursue.

The other justices concurred.

PEOPLE *ex rel.* HEDGMAN v. BOARD OF REGISTRATION.

(36 Mich. 51.)

Citizenship — children born abroad of parents born in slavery.

A person born in Canada of parents of African blood who were born in Virginia and held there as slaves until they emigrated to Canada, *held*, not entitled to vote as a citizen of the United States without being naturalized.

APPLICATION for *mandamus*. The opinion states the case.

Alfred Russell, for relator.

D. C. Holbrook, for respondent.

COOLEY, J. This is an application for a *mandamus* to compel the respondents to register the relator as a voter. The facts are, that his parents were persons of African blood, born in Virginia, and held there as slaves; that they left there and went to Canada in 1834, where from that time they resided, and where the father still resides; that the relator was born in Canada some thirty-five years since, and continued to reside there until he was nearly twenty years of age, when he removed to this State, and now resides in said first ward. If these facts show him to be a citizen of the State of Michigan, he is entitled to be registered; otherwise not.

It is claimed, on behalf of the relator, that he becomes a citizen by force of the new amendments to the federal constitution. The particular point relied upon is, that by the fourteenth amendment all persons born in the United States, and subject to the jurisdiction thereof, are declared to be citizens; that, consequently, the

People ex rel. Hedgman v. Board of Registration.

parents of the relator are such, and the laws of congress, which make citizens of the children of citizens born abroad, will apply to the case of the relator, and render him a citizen also. On the other hand, it is argued by the city counselor, who appears for the respondents, that the laws of congress do not reach the case of one whose parents were not citizens at his birth, and that the parents of the relator were not, since it is admitted they were of African blood, and by the decision in the case of *Dred Scott*, 19 How. 393, which established the rule of law up to the time of the adoption of the fourteenth amendment, persons of African descent were not and could not be citizens.

If this application depended upon the case of *Dred Scott*, we should have little difficulty in deciding it. The decision there declared that free blacks were not citizens; but, though when first decided it must have commanded that respectful deference and strict obedience which is always due to the decisions of the court of last resort on questions of federal law, we think the time has gone by when it can be regarded as possessing the force of authority. For upwards of ten years it has been wholly ignored in the action of the political departments of the Federal government, and some years before the adoption of the fourteenth amendment, the supreme court of the United States had practically overruled it by admitting persons of African descent to practice at its bar. We think, therefore, that we are justified by the action of that tribunal, in treating its former decision as practically set aside.

But we do not think the case can turn upon any question of the binding force of that decision. The point in dispute here is, whether the parents of the relator were citizens of the United States. The record shows that they were not free, but held in servitude, while they remained within its jurisdiction.

Now, it is undeniable that those persons should never have been slaves, and that neither they nor any others ought in justice to lose any right or privilege in consequence of their having been the victims of a wrong. But questions like the one before us can never be disposed of on considerations merely of what ought to be, or ought to have been. We cannot shut our eyes to historical facts because of their being disagreeable to ourselves or discreditable to the country. Slavery was the great ugly fact of our history; it affected the peace, the morals, the happiness of the people; it threatened the existence of the government; at last it convulsed

People ex rel. Hedgman v. Board of Registration.

the nation in civil war. Private interests and public interests have been, and still for a long time must be, affected by the mere fact of its having existed, and we can no more ignore it than those who established independence could ignore the previous events that made independence essential. When they came to adjust their new relations, those previous events must needs have more or less bearing. Here the question is, what the *status* of certain persons was before emancipation; and, if we find they were slaves, we are compelled, however unwillingly, to recognize the fact and its consequences. The supreme court of the United States has recently been obliged to decide that contracts growing out of the institution of slavery, are not only valid since the new amendments, but that the people of the States have no power, and congress can confer none upon them to nullify such contracts by their new constitutions. *White v. Hart*, 13 Wall. 647; *Osborn v. Nicholson*, id. 654. As a consequence, State courts in the southern States are now, under the mandate of the federal court, enforcing contracts made on the sale of men, and considering questions of their market value, and of their soundness as articles of merchandise, precisely as if they were actually mere beasts of burden. In short, we have abolished slavery, but we have not abolished the pre-existing history, and we cannot prevent the consequences following the facts recorded.

Now, citizenship implies the obligations of allegiance on the one side, and the rights of protection on the other. From the very nature of chattel slavery, neither the obligations nor the rights could exist, except in a very imperfect state. Slavery is the negation of natural right, and the rightful resistance to it can only be limited by considerations of prudence. In the declaration of independence, liberty is ranked with life as among the things which are inalienable, and Warren, the chief of the early martyrs of the revolution, declared slavery the greatest of all crimes in its victim, if it were possible for him to be rid of it. It is obvious that the person subjected to it is denied the rights of a citizen; and whatever of obedience a government can exact of him, is not upon the ground of his being a party to the fundamental compact, but as a part of the system which takes from him those inherent rights which, voluntarily, he had no power to surrender. For these reasons the municipal law, neither here nor elsewhere, recognized slaves as citizens.

We have no information concerning the reasons which induced

the relator's parents to abandon the State of their birth and go to Canada, but the inference from the record is a legitimate one, that they went to escape from bondage to freedom. They did not go as representatives of the United States, proud of its flag and its liberties, but as fugitives from the United States, fearing its flag and hating its oppression. They did not carry citizenship with them, but they fled from slavery. They abandoned a country to which they admitted no obligations, because its laws denied them all rights. So far from extending to them its protection, the laws of the country they left volunteered the assistance of its officers in seeking out and seizing them, if they should venture to seek liberty, in order that they might be restored to a bondage which promised to be perpetual to them and their descendants. What possible obligation could the mere fact of birth upon the soil of America impose upon a person thus condemned by its laws to be the hopeless slave, the mere chattel, subject to be bought and sold, in his person and posterity, at the will of another? We may bring this to a proper test, perhaps, by supposing that a war should unhappily spring up between ourselves and the neighboring dominion, and that our government should endeavor to enforce the obligations of citizenship against any of those fugitives who had sought in that country the liberty denied them at home; should endeavor, for example, to force them into its armies, or to visit them with the penalties of treason if they should voluntarily enter the armies of their adopted country—is it not clear that the moral sense would be shocked, and the instincts of justice implanted in every man's breast revolt at so gross and palpable a misapplication of the doctrines of natural allegiance? The supposition is indeed too monstrous to be indulged. We are driven to confess, however mortifying it may be to our national self-complacency, that, up to 1861, Canada was, as regards the class in question, a refuge from American oppression, and that those who fled thither were guiltless of wrong in repudiating allegiance to the government they escaped, and in rejecting such protection as it would have extended to them.

It follows, therefore, that the parents of the relator were never citizens of the United States prior to the adoption of the fourteenth amendment. That amendment, it is clear, does not make them such. It declares, that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

People ex rel. Hedgman v. Board of Registration.

of the United States, and of the State wherein they reside." These persons are not subject to the jurisdiction of the United States. They have chosen another jurisdiction, and cannot have our citizenship forced upon them. The fourteenth amendment makes the offer of citizenship, but, if they come within the offer, they can accept it only by bringing themselves within the jurisdiction, which hitherto they have not chosen to do. The relator himself does not come within the terms of the fourteenth amendment, because he was not born within the United States. If he is not a citizen by virtue of his parents having been such, then, allegiance by birth, so far as it exists at all, must be due from him to the British government, under which he was born, and he might at any time return and claim the rights of a British subject. Such, we think, is his position. He can become an American citizen, but only in the same modes as any other person of Canadian birth.

The fifteenth amendment does not help the case. That declares that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude. Under this the prerequisite is that he is a citizen. The relator was never in a condition of servitude, and his color is no impediment to citizenship. He has the same rights with any native-born white British subject to become a citizen under the naturalization laws, if he shall desire to do so.

It follows that the writ must be denied.

CHRISTIANCY, C. J., and GRAVES, J., concurred.

CAMPBELL, J. I think the act of congress which gives children citizenship by reason of parentage, inasmuch as it refers only to children of those who then were and thereafter should be citizens at the time the children were born, cannot apply to any whose parents, at the time of their birth, were domiciled abroad, and not recognized by American law at the time as entitled to civil rights. If the fourteenth amendment now applies to the parents—a point not now before us—it cannot act retrospectively to change facts formerly existing. I concur. therefore. in holding the relator is not a citizen.

SNYDER V. PEOPLE.

(26 Mich. 106.)

Arson — burning by husband of wife's dwelling-house.

A husband, living with his wife, and having a rightful possession jointly with her of a dwelling-house which she owns and they both occupy, is not guilty of arson, by the common law, in burning such dwelling-house; and this rule is not changed by a statute securing to the wife her separate property.

INFORMATION for arson. The opinion states the case.

Newton Foster and *L. A. Tabor*, for plaintiff in error.

Dwight May, attorney-general, for the People.

COOLEY, J. The plaintiff in error was informed against for arson, which is charged to consist in the felonious burning, in the night time, of the dwelling-house of Mary A. Snyder. On the trial it appeared that Mary A. Snyder was his wife, and defendant (below) insisted that he could not be guilty of arson in burning her house. He also claimed to be the owner of the house, in fact, and this claim was submitted to the jury, who found against him. The prosecution, on the other hand, gave some evidence tending to show that defendant had separated himself from his wife, and given up his residence in the State. This evidence, however, did not become important on the trial, as the court instructed the jury that a husband might be convicted of arson in burning his wife's dwelling-house, though residing with her, and defendant was convicted accordingly.

The statute provides that "Every person who shall willfully and maliciously burn in the night time, the dwelling of another," etc., shall be punished, etc. Comp. L., § 5745. There are numerous decisions as to what is meant by the *dwelling-house of another*, as well at the common law as under like statutes to our own. Arson is an offense against the habitation, and regards the possession rather than the property. *State v. Toole*, 29 Conn. 344. The house, therefore, must not be described as the house of the owner of the fee, if

Snyder v. People.

in fact at the time another has the actual occupancy, but it must be described as the dwelling-house of him whose dwelling it then is. 2 East's P. C. 1024 ; 4 Bl. Com. 220 ; Whart. Cr. L., § 1658 ; 2 Bish. Cr. L. (2d ed.), § 24 ; *Holmes' Case*, Cro. Car. 376 ; *Spalding's Case*, 1 Leach, 218 ; *Commonwealth v. Wade*, 17 Pick. 395. Even, it seems, though the occupation be wrongful. *Rex v. Wallis*, 1 Mood. C. C. 344 ; *State v. Toole*, 29 Conn. 344. It follows that a lessee could not be guilty of the felony in burning the premises occupied by him as such (2 East's P. C. 1029 ; 2 Russ. on Cr. 550 ; *McNeal v. Woods*, 3 Blackf. 485 ; *State v. Lyon*, 12 Conn. 487 ; *State v. Fish*, 3 Dutch. [N. J.] 323 ; *State v. Sandy*, 3 Ired. 570 ; 3 Greenl. Ev., § 55), while the landlord, during such occupation, might be. 2 East's P. C. 1023, 1024 ; *Sullivan v. State*, 5 Stew. & P. 175. A jail, it has been held, may be described as the dwelling-house of the jailer living with his family in one part of it. *People v. Van Blaricum*, 2 Johns. 105 ; *Stevens v. Commonwealth*, 4 Leigh, 683. And it seems that the wife, because of the legal identity with the husband, cannot be guilty of the offense in burning the husband's dwelling, even though at the time living separate from him. *March's Case*, 1 Mood. C. C. 182. This would doubtless be so held whenever the wife's domicile is regarded in law as identical with the husband's, which for many purposes is no longer the case when they live separate.

It must be evident from this summary of the law on this subject that if the husband, living with his wife, has a rightful possession jointly with her of the dwelling-house which she owns and they both occupy, he cannot, by common-law rules, be guilty of arson in burning it. It remains to be seen whether the statutes have introduced any changes which would affect the case.

The statutes upon which the question arises are those for the protection of the rights of married women. But it is to be observed that those do not in terms go beyond the insuring to the wife such property as she may own at the marriage and acquire afterward, and the giving to her the power to protect, control and dispose of the same in her own name, and free from the interposition of the husband. None of them purports to operate upon the family relations ; none of them takes from the husband his marital rights, except as they pertain to property, and none of them relieves him from responsibilities, except as they relate to the wife's contracts and debts. He is still under the common-law obligation to sup-

port the wife, and the services of the wife, which at the common law were regarded as the consideration for this support, are still supposed to be performed in his behalf and in his interest, except where they are given to her individual estate or separate business. The wife has a right to receive her support at the husband's domicile, unless she has lost it by misbehavior, and husband and wife together have a joint interest in and control of the children, which they cannot of right sever, and which are not, even in contemplation of law, regarded as distinct, though the courts are sometimes compelled to treat them as if they were so, when difficulties arise which make legal intervention essential to the protection and welfare of the children. As regards her individual property, the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation is no more broken up by giving her a statutory ownership and control of property than it would have been before the statute, by such family settlement as should give her the like ownership and control. At the common law the power of independent action and judgment was in the husband alone; now it is in her also, for many purposes; but the authority in her to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity than the corresponding authority in him. She is still presumptively his agent to provide for the household, and he is not deprived of the rights or relieved of the obligations of head of the household, except as by their dealings and intent to that effect is indicated.

So far from an intent having been manifested on the part of the legislature to regard the family as simply a voluntary association of two persons, legally independent of each other, with their progeny, several of the changes have been in the direction of a unification of interests. Thus the husband is deprived of all authority to sell, mortgage or otherwise charge the homestead without the wife's consent, though his title thereto may be complete and absolute. Const., art. 16, §§ 2, 3; *Dye v. Mann*, 10 Mich. 291; *McKee v. Wilcox*, 11 id. 358; *Ring v. Burt*, 17 id. 465. He is also precluded from selling or encumbering such personal chattels as are exempt by law from execution, unless with her assent (Comp. L., § 4465); and if he shall attempt to do so, she may bring action to recover the same in her own name. Comp. L., § 3294. These powers and

Snyder v. People.

privileges in respect to the husband's property are not conferred on the wife for her own benefit exclusively, or in order to give her interests independent of the husband; but they are given her for the benefit of the whole family, in order that they may not be deprived of the reasonable means of support which the law has endeavored to save to them, and to the end that they may be kept together as a family, if such shall be their desire. And after the death of the husband and father, the family unity is still regarded in the protection which is given to the homestead. Const., *ubi supra*.

We have said that the wife is entitled to support at the husband's domicile, and, as we have seen, she may prevent his disposing of it. The statute has not given him a corresponding right to impede or preclude conveyances or incumbrances by the wife, but nevertheless so long as they occupy together he is not to be considered as being upon the premises by sufferance merely. He is there by right, as one of the legal unity known to the law as a family; as having important duties to perform, and responsibilities to bear in that relation, which can only be properly and with amplitude performed and borne while the legal unity represents an actuality; as having rights in consort and offspring which can only be valuable reciprocally while the one spot, however owned, shall be the home of all; and in many ways he still represents the family in important relations of society and government. Some of the legislation on the subject is exceedingly crude; some of it has injudiciously given powers to the wife in the disposition of property, which it has prudently denied to the husband; but none of it makes the husband a stranger in law in the wife's domicile. The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling-house, the *domus*, is that of both.

If, therefore, the husband shall be guilty of the great wrong to his wife and family, of setting fire to the house they inhabit, he is no more guilty of arson in so doing than the wife was at the common law for a like wrong to the dwelling-house of the husband. The case is a very proper one for a penal statute, but none has yet been enacted to meet it. The house, in legal contemplation, as regards the offense under consideration, is the dwelling-house of the husband himself.

But in so holding we do not decide that if the family relation is broken up in fact, and husband and wife are living apart from each

other, whether under articles of separation or not, the same exemption from criminal liability can exist. There is much reason for holding that the wife's dwelling-house can be considered that of the husband, only while he makes it such in fact, and that there is no such legal identity as can preclude her house being considered, in legal *proceedings* against him, as the dwelling of "another," when it is no longer his abode. That case was not fairly presented upon this record, and was barely alluded to on the argument; and it must be left for the proper consideration when it becomes necessary to decide it. We confine our attention now to the case of a husband in the practical exercise of the right to reside with his family in the wife's dwelling-house, which the wife, at the same time, practically concedes. In such a case the dwelling-house cannot be said not to be that of the husband.

It follows that the judgment was erroneous, and it must be reversed, and a new trial ordered.

The other justices concurred.

MILLER V. FINLEY.

(28 Mich. 242.)

Promissory note — impeaching consideration — alteration of by adding another name — drunkenness of maker — holder for value.

In an action by a holder in good faith against the maker, on a promissory note given for an interest in a patent right, *held*, (1) that evidence of the worthlessness of the patent was inadmissible under the general issue; (2) that the maker was not discharged nor his liability affected by the addition of the name of another as surety; (3) that the drunkenness of the maker was not a defense in the absence of proof of fraud, or of his absolute incapacity; and (4) that the note being fair on its face, it could only be impeached in the hands of a holder for value, by evidence of bad faith.

ACTION on a promissory note; the opinion states the case.

May & Buck, for plaintiff in error.

J. W. Breese and *H. F. Severens*, for defendants in error.

Miller v. Finley.

CAMPBELL, J. Miller sued below upon a joint and several promissory note. Both defendants pleaded the general issue, and Hugh Finley, junior, appended to his plea an affidavit denying the execution of the note by himself. No notice of any kind was filed or served with the plea.

Upon the trial the defense was rested upon several grounds. It was claimed that Hugh Finley, senior, signed the note without the consent of Hugh Finley, junior, his son, who, it was alleged, refused to assent to having him sign, and after the note had been delivered as the sole note of the son. It was further claimed that when he signed it, he was in such a state of drunkenness, procured by the original payee, that he was not responsible for his acts. It was also set up, that the note was one of several obtained by fraud, as the price of a worthless patent, for a horse-collar fastener.

Miller claimed as a *bona fide* holder. Judgment was rendered for defendants below, and he now brings error.

The whole testimony given in the court below, concerning the character of the patent-right, was, we think, wrongly admitted. There was no question concerning the transfer of the patent-right, and such a right is a right of property. Its value being incapable of reduction to any fixed sum, and being altogether a matter of opinion, any price agreed upon, unless manifestly exorbitant, would be enforced, in the absence of fraud and misrepresentation. A note given for the price cannot be regarded as a note given without consideration; and any defense arising out of such circumstances must be specially pleaded and cannot be shown without notice. All the testimony admitted for the purpose of showing the worthlessness of the patented invention, was, therefore, irrelevant, and it was error to admit it.

It is also claimed by plaintiff in error that the alteration in the note whereby Hugh Finley, senior, became a party to it was not, as to the original signer, a material alteration. There is no doubt that any material alteration in a note, without the consent of the party responsible on it, and affected by it, will destroy it as to him. *Wait v. Pomeroy*, 20 Mich. 425; 4 Am. Rep. 395; *Holmes v. Trumper*, 22 Mich. 427; 7 Am. Rep. 661; *People v. Brown*, 2 Doug. 9. And there can be no question but that an addition to the number of signers of an instrument may in some cases, at least, affect the operation of it, as to some or all of those who have already signed.

The doctrine is settled in New York that procuring the signature

signing, and its genuineness is not in issue. There is no question in the case as to the identity of the paper. The note he signed was the one the son supposed he was signing, and there was no substitution of one paper for another. The defense rests upon the ground of fraud, and not of illegality, and while, if the old man's story is true, the note would be voidable as against the payee, it would not be a nullity as to all persons.

There is nothing on the face of the paper to cast suspicion upon its character, and it can only be impeached, in the hands of a holder for value, by evidence that he took it under circumstances which rendered him guilty of bad faith. *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 110; *Goodman v. Harvey*, 4 Ad. & El. 870; *Uther v. Rich*, 10 id. 784; 2 Pars. on Bills, 280; Redfield & Bigelow's Leading Cases on Bills and Notes, 239, 257.

The proof must show that the holder for value, who takes a note with no earmarks of fraud or illegality, has had notice of such a nature that he could not honestly take the paper without further inquiry. The facts of which he must have either knowledge or notice must be such as go to the defects of title. The defect set up here were the fraud alleged to have been practiced on the elder Finley, by taking advantage of his drunkenness, and the cheat, if there was any, whereby the younger Finley was induced to purchase the patent. The latter we have intimated was not properly in the case. But if it had been admissible, it would, perhaps, be of no special importance, as presented by the record as it stands. We have found nothing in the testimony tending to show that Miller had heard or known any thing about either of these defenses. The court declined to instruct the jury that notice that the note was given for a patent-right would not be sufficient to charge plaintiff. Whatever may have been the experience of our people with itinerant patent-venders, it cannot properly be assumed as a fact that a patent, regularly issued by the department, lacks either novelty or utility. And, as fraud can never be presumed without proof, the jury could not properly be charged upon any theory supported by no evidence at all.

These points were evidently subordinated to the other legal propositions, and it was probably not deemed necessary to criticize them very closely, when the case was made to turn chiefly upon the other rulings.

The judgment must be reversed, with costs, and new trial granted. The other justices concurred.

Scott v. Bush.

SCOTT v. BUSH.

(26 Mich. 418.)

Statute of frauds—oral agreement for purchase of land—deposit of stipulated damages.

Plaintiff verbally agreed to purchase land of defendant, and paid money with a stipulation that defendant might retain it as a forfeiture if plaintiff failed to complete the contract. The defendant was willing and offered to convey, but plaintiff refused to perform. *Held*, that the whole agreement was one entire contract; that it was void by the statute of frauds; and that the plaintiff could recover the money paid as money had and received.

ACTION for money had and received. The opinion states the case.

Gibson & Wolcott, for plaintiff in error.

Johnson & Montgomery, for defendant in error.

CAMPBELL, J. This case presents the single question, whether a person who has made a verbal arrangement with another to purchase land of him, and has paid money with a stipulation that he may retain it if the purchaser fails to complete the bargain, can recover back the money, where the vendor is willing and offers to convey.

It is necessary to consider on what grounds the holder of the money can claim to hold it. It cannot be held as in any way analogous to a gift. It is delivered upon condition, to be held in case of a failure to perform an expected act, but, in case of performance, to be applied toward the full price of land. It cannot, then, be put upon any other ground than that of an agreement, involving rights and obligations on both sides, and a forfeiture upon the default of the party paying over the money.

This agreement is an agreement for the purchase and sale of lands; and the stipulation for a forfeiture of the deposit is the agreed penalty, or, more properly, the stipulated damages, for its breach. If the contract is valid the forfeiture is valid, as it is not claimed to be unreasonable; but if the contract is not valid, then

no part of it can be enforced, without leading to confusion and contradiction.

Under our statutes every contract for the sale of lands is void, unless the contract, or some note or memorandum of it, is in writing, and signed by the vendor, or his agent lawfully appointed in writing. 2 Comp. L. 1874, § 4694. The law does not require the purchaser to sign the agreement, and he is liable, therefore, upon the written contract, though his own assent is verbal. *Holland v. Hoyt*, 14 Mich. 238. The statute does not require the consideration to be set forth in writing, but allows it to be proved otherwise. § 4695.

The validity of part performance, as taking contracts out of the statute so as to authorize their specific performance, is also declared. § 4696.

The only consideration for the agreement of the purchaser to forfeit his deposit in this case was the verbal promise of the vendor to convey. No possession was given of the land, and no act whatever was done by the vendor. The payment of the deposit was not such an act of part performance as would, under any of the authorities, authorize the purchaser to demand a specific performance.

There was, then, no consideration whatever for his agreement, and it gave him no rights against the vendor. The arrangement, therefore, was in no sense a contract, and he was not bound by it. Until both parties are brought into binding relations, their dealings have no effect. They can only be regarded as preliminary negotiations, which confer no rights.

They cannot, therefore, be made binding thereafter by any attempt of a single party to force a contract on the other. If there was no contract already in existence, the subsequent assent of both was as necessary as if they had never negotiated. A party who has never become bound cannot be held by any but his own agreement. And the cases which intimate that one party cannot retract, if the other is willing to perform, give to the arrangement all the effect of a solemn contract, and enable agreements to be made as well as enforced, at the will of one of the parties, without any concurrence of the other.

We have held in *Chamberlain v. Dow*, 10 Mich. 319; *Hall v. Soule*, 11 id. 494; *Holland v. Hoyt*, 14 id. 238; and *Grimes v. Van Vechten*, 20 id. 410, that a contract void under the statute of frauds is a mere nullity, and cannot be used for any purpose whatever.

Scott v. Bush.

And we cannot conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else.

The decisions which have been made in several States refer, for their authority, chiefly to some early decisions in New York. The brief report in *Dowdle v. Camp*, 12 Johns. 451, rested the refusal to allow the purchase-money to be recovered back from a vendor willing to perform, on the ground that equity would compel performance in favor of the purchaser. And the same doctrine was held in *Abbott v. Draper*, 4 Den. 51, where the purchaser's possession was more distinctly relied on. And in *Rice v. Peet*, 15 Johns. 503, and *Thayer v. Rock*, 13 Wend. 53, it was said that there could be a recovery back of money paid, where there were no such exceptional circumstances. And in *Duncan v. Baird*, 8 Dana, 101, where a payment had been made in a specific article, and not in money, the court held that there was no room for even an implied assumpsit, and that the action should be replevin or trover, for the chattels withheld.

Some decisions have apparently disregarded this distinction between contracts, made valid by part performance, and stipulations or arrangements, which have never become binding. An agreement made valid by part performance is, in law, as valid as in equity, for all purposes except the remedy to enforce it. An equitable right is as good a consideration for a contract as a legal right. *Holland v. Hoyt*, 14 Mich. 238. Had the plaintiff in this case obtained possession from the defendant, under the verbal arrangement, the contract would have been taken out of the statute, and would not have been void. But as the case stands, we cannot see why, if the willingness of the vendor to convey entitles him to keep money paid and agreed to be forfeited, he would not equally be entitled to enforce a promise to pay a like sum on the same conditions. There is no middle ground between binding contracts and the absence of any binding obligation.

We think the court below erred in refusing to allow a recovery, and that the judgment should be reversed, with costs, and a new trial granted.

The other justices concurred.

MERWIN v. THE PEOPLE

(26 Mich. 293.)

Indictment for larceny — description of property.

Information for larceny of "one hundred and thirty-five dollars of the property, goods and chattels" of C. Held bad for uncertainty.

INFORMATION for larceny. The opinion states the case.

S. Larned and *F. A. Baker*, for plaintiff in error, cited *Rhodus v. Com.*, 2 Duv. 159; *Hamblett v. State*, 18 N. H. 384; *State v. Hinckley*, 4 Min. 345; *Lord v. State*, 20 N. H. 404; *Low v. People*, 2 Park. Cr. 37; *State v. Longbottoms*, 11 Humph. 39; *State v. Murphy*, 6 Ala. 845; *Com. v. Smith*, 1 Mass. 245; *Wilson v. State*, 1 Port. (Ala.) 118; *Collins v. People*, 39 Ill. 233; *Broms v. Com.*, 2 Duv. 351; *State v. Goodrich*, 46 N. H. 186; *Sheppard v. State*, 42 Ala. 531.

Dwight May, attorney-general, for the People.

CHRISTIANCY, C. J. The information in this case charges that defendant, "on the 28th day of June, 1872, at the city of Detroit, did feloniously steal, take and carry away, of the property, goods and chattels of John C. Connell, from the possession of said John C. Connell, then and there being found, *one hundred and thirty-five dollars*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The only question is whether the information properly charges the offense of larceny, without a more specific description of the property stolen, or any allegation of its value.

So far as regards the substantial nature and description of the offense, and the mode of setting out the criminal charge, the sufficiency of the information must be tested by the same rules applicable to an indictment. Sess. L. 1859, p. 392, §§ 3, 4; Rev. Charter of the City of Detroit, ch. 6, § 7.

And, since the prosecution, in drawing the information, has not brought the case within the provision of any statute dispensing

Merwin v. The People.

with any degree of particularity or precision in this respect required at common law — as will be fully shown hereafter — the sufficiency of this information must be tested by the rules applicable to an indictment for larceny at common law.

Among the objects to be accomplished by the mode of setting forth the criminal charge, with its essential and descriptive circumstances, and especially the description of property stolen, the following have always been recognized as fundamental: *First*, to identify the particular transaction charged as criminal, so that the defendant shall not be liable to be put upon his trial for an offense different from that for which the grand jury have found the bill, or (when under our law the information is substituted) different from that to which the person verifying the information intended to swear; *second*, that the defendant's conviction or acquittal may inure to his subsequent protection, should he be again prosecuted for the same offense (and though the identity may be shown by evidence *aliunde* where it does not clearly appear from the record, yet it would be more difficult for the defendant to show such identity where no specific description is given in the indictment); *third*, to inform the defendant of the particular transaction constituting the offense for which he is to be tried, that he may be able to prepare for his defense; and *fourth*, to enable the court, looking at the record after the conviction, to decide whether the facts, as charged, are sufficient to support the conviction, to decide whether the facts, as charged, are sufficient to support the conviction and warrant the judgment; and also, in some instances (as in larceny where the statute provides different degrees of punishment for larcenies above or below a certain amount or value, like our own) (Compiled Laws, 1857, § 5762), to guide the court in the infliction of the proper measure of punishment. See Starkie's Cr. Pl. (2d ed.) 68; 1 Bish. Cr. Pro., §§ 267, 268.

The ultimate design of all these objects is, fairness to the prisoner; and consequently any indictment which has failed to set forth the offense with such certainty as to accomplish any of these purposes, as far as the nature and circumstances of the case would permit, has generally been held bad, upon general demurrer, or motion in arrest of judgment, or on writ of error. It is, however, true, that in some cases, and to some extent, the omission to state facts not essential constituents of the offense in the abstract, but which are required to be stated, if known, may be excused by an

allegation, on the face of the indictment, showing why they could not be stated. Thus, *first*, the grand jury may not have been able to ascertain the names of third persons whose names ought regularly to be stated; or, *second*, the means used to take life, in a case of murder; or, *third*, if in forgery, the forged instrument be lost, or in the hands of, or have been destroyed or concealed by, the defendant; in the first case, the names, in the second, the means used to produce death, and in the third, the exact words of the forged instrument, may be stated to be "to the jurors aforesaid unknown" (though in the case of the forged instrument, its loss or destruction, or its possession or concealment by the prisoner, must be stated, and its substance given). And upon the same principle, the omission of a specific statement of many other facts, not absolutely essential to the existence of the offense, may doubtless be excused in the same way. And that the particular description of the pieces of money stolen, or the amount of each kind, may be excused on the same ground, and in the same manner was expressly held in *Commonwealth v. Sawtelle*, 11 Cush. 142.

And this allegation, that the name or other particular fact is "unknown to the grand jury," is not merely formal; on the contrary, if it be shown that it was, in fact, known to them, then—the excuse failing—it has been repeatedly held that the indictment was bad, or that the defendant should be acquitted, or the judgment arrested or reversed. *Rex v. Walker*, 3 Camp. 264; 1 Chit. Cr. Law, 213; *Rex v. Robinson*, Holt's N. P. 595, 596; *Blodget v. The State*, 3 Ind. 403; and see *Commonwealth v. Hill*, 11 Cush. 137; *Hays v. The State*, 13 Mo. 246; *Reed v. The State*, 16 Ark. 499, and 1 Bish. Cr. Pro., §§ 300–302, where the cases are cited and the result given.

Now, within the rules of certainty required by the common law, for the purposes already explained, it has been long and well settled that merely charging the defendant with having stolen "the goods and chattels" of another, is not sufficient (2 E. P. C. 777, 778); and it seems to be equally well settled that an indictment for stealing money is not sufficient, if it state only the aggregate amount, without any specification of the number, kind or denomination of the pieces; but that the number of the pieces and their denomination, and whether of silver, gold or copper, should be stated, and regularly the value of each kind, if known. This will sufficiently appear by the cases cited by the counsel for plaintiff in error; and

Merwin v. The People.

see the authorities collected in 2 Arch. Cr. Pl. (by Waterman), 355, 21; 2 Bish. Cr. Pro., §§ 663-668.

The present information fails utterly to comply with this rule, or to state any excuse for non-compliance. The charge is only of the stealing, etc., "of the personal property, goods and chattels of John C. Connell," * * * "one hundred and thirty-five dollars."

It is easy to see that under this general charge, defendant might have been put upon his trial for a transaction wholly distinct from that intended to be sworn to by the person verifying the information. And unless we are to presume in advance that the defendant is guilty, and must, therefore, know the transaction intended to be proved against him (which would be reversing the legal presumption), what information does it give the defendant, of the nature of the evidence intended to be introduced? And what information for his future protection would the record of his acquittal or conviction afford him? It is true that when the particular pieces have been properly described, and their number given, the prosecution are not bound to prove the whole number of pieces, or all the kinds mentioned; but no conviction can be had except upon those which are both properly described in the information or indictment, and proved on the trial; unless the omission of such description has been properly excused. But it is not even quite certain whether this information was intended to charge the larceny of money, or any thing circulating, or used as currency at all; or whether the intent was to charge the stealing of some other kind of personal property; or, if of money, or something circulating as such, whether it was in coin of any kind, or treasury notes, or perhaps bank bills. Money, it is true, if otherwise sufficiently described as such, may also be alleged to be the "goods and chattels" of the owner, though it is much more properly described as his "money." *Reg. v. Radley*, 1 Den. C. C. 450, 451; 2 Car. & K. 974; 3 Cox's C. C. 460. But, not being expressly described as "money," and there being nothing to show that money was intended, except the loose inference from the words, "one hundred and thirty-five dollars," in this dubious connection with "personal property, goods and chattels," it is not quite certain, from the face of the information, that the pleader did not intend to charge a larceny of the "goods and chattels" of the owner to the amount or value of one hundred and thirty-five dollars.

And the inference that this may have been actually the pleader's intention, finds some support from the fact that, if he had intended to charge the larceny of money, or any thing circulating as such, he would naturally have used that term, not only to bring the case clearly within the section (§ 5762, Comp. L. of 1857), which, if it does not create the offense of larceny, establishes two kinds or degrees of it, differently punishable as it exceeds or falls short of \$25 in value, and expressly enumerates money as distinct from other property, but also for the purpose of availing himself of the greater generality of description which might be allowed by section 6061 of the same statute. But, not having stated it to be "money," he has not brought the information within this provision.

But if the information intended to charge the larceny of money, does it mean so many single one dollar pieces, of gold or silver, and which of them? or so many United States treasury notes (which are made a legal tender), of one dollar each? or does it mean so many dollars in the aggregate, of either one kind, without reference to the number or value of the pieces? or so many dollars in the aggregate, though composed partly of one kind and partly of another, and without reference to the respective amounts, or number of pieces or notes, of either kind? These are questions which the information does not enable us to answer.

I have found no case, and no principle of common-law pleading, upon which such an indictment or information can be sustained without showing, upon the face of the instrument, some excuse for the want of greater particularity. By the well-settled principles of common-law pleading, the defendant was entitled, in fairness, to either a statement of the kind, denomination and number of the pieces, notes or bills claimed to have been stolen, or to an allegation of some excuse for the omission. If the prosecutor chose to present his information upon common-law principles of pleading, when he might have availed himself of a more loose or liberal rule established by statute, we must apply to the case the common-law rules; and by these rules this information is clearly bad.

The judgment must be reversed, and as no conviction can be had upon the information, the prisoner must be discharged.

The other justices concurred.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI

BANK OF LOUISIANA v. WILLIAMS, plaintiff in error.

(46 Miss. 618.)

Conflict of laws — contracts of married women — Lex loci contractus — Lex fori

A corporation of Louisiana, authorized by its charter to lend money to the "agricultural interest, on notes and mortgages," and to make such contracts with married women, and to enforce the same against their property, brought an action on such a contract, made in that State, against a married woman in another State, where she lived, and by the laws of which she was not personally liable on her contracts. *Held*, that the action could not be maintained.

ACTION on a promissory note. The opinion states the case.

Wm. F. Mellen, for plaintiff in error.

W. T. Martin, for defendant in error.

SIMRAËL, J. The bank of Louisiana, a corporation created by the State of Louisiana and domiciled there, sued David P. Williams and Elizabeth M., his wife, to recover the amount due on a promissory note, dated Concordia Parish, La., April 8, 1857, for \$30,000,

payable one year after date; the note was secured by mortgage on property situated in said Concordia Parish, La., executed by Williams and wife. Mrs. Williams pleaded her coverture, and that she was, at the date of the contract, resident in Adams county, Miss., and has since resided there.

The plaintiff relied upon the fact, that the charter of the bank authorized a married woman, jointly with her husband, to make this sort of contract.

It will thus be perceived that this is one of those embarrassing questions, arising out of the conflict of laws so perplexing to the courts. The general rule is, that *lex loci contractus* governs as to validity and construction; unless, indeed, some other State or country is appointed by the parties as the place of performance, and the contract is made with special reference to its law. It is laid down by Story on Conf. of Laws, § 232, to be a universal principle, common to the civilized world, essential to a contract, that it shall be upon a sufficient consideration, and lawful in its terms and purposes.

Theoretically, the rule of the civil law of Continental Europe is, that the legal capacity of a person to do, or not to do, certain acts, is to be referred to the law of the domicile. Thus, the Code Napoleon enacts: "The laws concerning the status and capacity of persons govern Frenchmen, even when residing in a foreign country." Practically, no nation or State ever gave effect to such a rule; the modifications and exceptions became so numerous that they have taken the place of the rule itself and almost superseded it.

It is not true generally, that the "status" and "capacity" of persons in foreign countries is determinable by the law of their domicile. An English nobleman would not be permitted, in an American court, to put in an answer in chancery on honor, because he had that privilege in his own country. Nor would a person, who had incurred the penalties of *premunire*, or who had suffered judgment of outlawry, be denied a remedy in our courts for a debt or a personal wrong, because the British courts were closed against him. In both cases, so soon as the limits of the country of the domicile are passed, the privilege in the one instance and the disability in the other ceases to have effect and will not be respected.

It is the prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there as to capacity and incapacity. But

capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not in the forum of his domicile, as they may infringe or not its interests, laws and policies.

Relations which are natural, and therefore universal, as husband and wife, parent and child, and tender infancy, will be considered as subsisting everywhere, and are under the protection of the laws of every country where the parties sustaining them may go. Natural incapacity is incident to tender infancy. The child of six, eight or ten years has not attained to the state of free moral agency, and is not accountable for his actions. It is to be supposed, therefore, that the courts of all countries would consider his acts, wherever done, as imposing no responsibility. But the age at which majority is attained, and responsibility for acts done begins, is not uniform in all countries. Each for itself prescribes the time, each determines for itself when the will and judgment are sufficiently matured for the duties and responsibilities of independent conduct. *Thompson v. Ketcham*, 8 Johns. 192, illustrates the proposition. The note was made in Jamaica, the defense was infancy according to the law of New York. It was determined that the transaction was subject to the law of the place of the contract and that infancy was a defense or not according to the law of Jamaica.

Contracts may be "located" in a country or State other than that in which they are made, as when performance is appointed there, and the parties may be supposed to have had in view that law. *Dalton v. Murphy*, 30 Miss. 65; *Le Breton v. Miles*, 8 Paige, 265.

Married women in this State hold their property by a tenure, which is defined either by the statute or the instrument under which it is conveyed to them. The original of the laws creating their separate estates is, doubtless, the doctrine which sprung up in the equity courts recognizing their usufructuary interest, while the legal title was held for their use by a trustee. The principle was imported by the equity courts from the civil law, as were many others. As usee or *cestui que trust*, they were regarded as owners, capable of almost an unrestrained power of disposition. They could not be called to account for the manner in which they disposed of the income, and they could create charges and debts which equity would respect and effectuate out of the trust property. The entire theory had its origin in the equity courts, and was

encouraged and amplified, so as to free married women from marital restraints and disabilities *quoad* the trust estate. In their transactions touching the property, they were treated as owners, they acted as *femes sole*; but it was only in the courts of chancery that they had that character. The law courts, whenever their contracts or obligations were brought before them, rejected them as void pacts importing no force or validity. The circumstance that she had a separate estate, and made the engagement with reference to payment from that source, did not emancipate them from the disability of coverture. Our statutes, therefore, undertook to deal with this subject so as to simplify her relations to her property, her power over it, and, by operation of law, to convert the equitable estate *sub modo* into a legal estate; so that, in so far as it was wise and prudent for her to create liabilities, they should be legal debts recognizable in a court of law and collectible out of her property. Instead of looking to the rules and principles which were devised in equity as defining her relations and powers over her property, we refer to the statutes as prescribing the conditions upon which she may charge it, or to the instrument under which she holds it. They are limitations of her estate; they are the conditions on which it rests. If a foreign creditor comes into this State and seeks compulsory payment of a debt made by a wife abroad, he must submit himself to the law of the forum for his remedy; he must consult the rules and regulations which govern courts here as to the form of the suit, and, according to the character of his "right," our system of jurisprudence determines whether he must sue at law or in chancery.

If an estate be in the wife by deed or will, with power expressly conferred to borrow money or incur debt, for all purposes which shall be binding upon it, he may address himself to the chancellor, as a creditor, having a right to be paid out of that fund. If he goes into a court of law, he is met at the threshold with a notice that the wife holds her separate property under certain restrictions and limitations; that, if the boundaries of her power have not been passed, the court is prepared to give him redress. But he must satisfy the court that his debt was such a charge upon her estate, or its income, as she had the power to make; otherwise it would be a violation of the tenure, the conditions of her title, to allow him to subject it. But the creditor may say, "I cannot bring this debt within the terms defined by your law. Nevertheless it was such

Bank of Louisiana v. Williams.

a contract as a married woman could make by the law of Louisiana. Comity requires your courts to treat the contract precisely as Louisiana would, and I demand a judgment against the wife." "No," says the court, "you cannot get here any fruit of a judgment; there is nothing subject to its payment, and our law affords no remedy against a married woman in any of its courts, law or equity, except through a property which she has, and which must be pointed out by the creditor. We know of no such thing as a personal obligation, aside from and independent of a property which may discharge it." If she holds property under a deed or will, with unlimited power to charge and dispose of it, a court of equity will effectuate her contracts, by treating them as a charge or *quasi* lien on her estate, but not as creating any personal obligation on her, for the moment her separate estate has been exhausted (there being no personal separate obligation), all remedy in favor of creditors is exhausted.

But it is said that this contract, being made in Louisiana, if good there is good everywhere. Let us look closely to the transaction and analyze its parts and its entirety. The charter of the bank directed \$2,000,000 of its capital to be employed in loans to the agricultural interest, on notes and mortgages, renewable for a term of years; the property hypothecated to be worth twice the amount of the loan; and, inasmuch as many landed estates belonged to married women, by the 32d section of the charter they were authorized to "bind themselves jointly and *in solido* with their husbands, in all hypothecatory contracts and obligations made with the bank, and in such case the property and rights of such wife, either dotal or of any other description, shall be effected by such contracts and obligations, provided the wife be of age at the making of the contract." It is manifest that the scheme of the bank was to encourage the agricultural interests of Louisiana, and the loans of the \$2,000,000 were to be made upon real estate situated there. The loans to agriculturists are expressly required to be made upon mortgage — "hypothecatory contracts" is the language. The wife is emancipated, so far, and so far only, as to capacitate her to join with her husband in the "hypothecatory obligation." She subjects all her rights and property, "dotal," or of any other description. Her paraphernalia, wardrobe, jewels and ornaments, according to her degree in life, are pledged, as well as her property at the marriage, or subsequently coming to her. This obligation, which is

Bank of Louisiana v. Williams.

exceptional, not allowed by the general law in its scope and effect, submits all her property and rights to the discharge of this obligation. This brief review conclusively shows that the contract is local, purely and entirely, founded upon a local policy, and can only be made by a class of married women, the wives of agriculturists, whose estates are situate in Louisiana. It certainly was not contemplated by the charter of the bank that these loans should be made on mortgages of plantations outside of that State. It was intended that the most ample security should be given for the debts, and that the performance of the contract should be made within the State. Nor was it supposed that the obligation of the wife extended further than to cover her dotal and paraphernal rights and property in that State. It is as much as if the law-maker had said, married women can mortgage their landed estates, and bind dotal and other property situate in that State, for this sort of contracts.

The transaction stands upon ground local to Louisiana, and a policy there which is exceptional from the general rule and general law. Assuming, as a doctrine of the law, that the contract of a married woman, valid at the place where made, shall be so regarded everywhere, does that embrace an obligation incurred by her, growing out of special circumstances, and not included in the general law and policy of the place, but resting altogether on special reasons, and looking to local property for its payment? If, by the law of Louisiana, a married woman was competent to incur debts generally, and coverture imposed no disability, it would be a different question from that we are dealing with. If a married woman resident here, while temporarily in that State, should incur a debt and courts should be appealed to to enforce it, comity might enjoin the duty of a remedy, if our system could provide one. But we would be under no duty to give a "personal judgment" if such a proceeding had no place in our jurisprudence. The utmost that we could do would be to lay hold of her property here and apply it, provided in so doing we did no violence to the essential conditions and tenure by which she held it. If she contracts a debt in Louisiana, or at home, she charges it upon her estate here, unless the terms upon which the estate rests and is held forbid it. It matters not whether the suit be at law or in equity, whether the property be unconditionally hers at the marriage, or come to her by descent or devise afterward, or in any other mode, creditors, upon whatever

Bank of Louisiana v. Williams.

consideration the debt arose, have no remedy under our system of jurisprudence, against her "personally." The proceeding is *in rem* against her estate. If the suit be at law under the statute, while the judgment may be for so much money, it is a necessary part of it, that it be levied of her separate estate. The condition precedent to a right of recovery either at law or in equity is, that there be a separate estate out of which satisfaction may be had. Our jurisprudence does not realize the possibility of a "personal judgment against a married woman." And has remedial machinery for creditors, only against those who have property, and only then to the extent of its value or its income, as the case may be.

But for the express authority conferred by our statutes, it is evident that a married woman could not be sued at law upon her contracts. To the extent enumerated in articles 24 and 25, courts of law are empowered to enforce her contracts (but that, as we have said, is specifically against the property). The difference between the separate estate, as recognized in courts of equity, and the title to property, and rights connected with it, as declared and defined in the statutes is, that the former is an equitable, and the latter is a legal estate; the former is created by a conventional instrument, or by devise, and may contain restrictions or not on the power of disposition, or the title may be simply placed in a trustee for her use, without prescribing the extent of her power over the estate, or restricting her right of charging it. In the leading case in this country, of *Jaques v. Methodist Church*, 17 Johns. 548, it was accepted by Chancellor KENT, as the true doctrine, that she was, as to her separate estate, a "*feme sole*," and may charge or dispose of it very much at her pleasure, unless restrained by the instrument creating it. In the latter case of *Gardner v. Gardner*, 22 Wend. 526, it was held to be the better opinion, that debts contracted expressly for her own account ought to be considered as an appropriation, or appointment for the creditor of so much of her separate estate as may be needed to pay the debt. The earlier English cases proceeded upon the ground that the main object of the trust was, that the property might be deemed as held for the payment of her debts. *Norton v. Turvill*, 2 P. Wms. 145. In *Peacock v. Monk*, 2 Ves. Sr. 190, Lord HARDWICKE said, if the wife gave a bond for borrowed money, this would give a foundation to demand the money out of her estate. The doctrine was extended so as to include all obligations given by the wife, whether as surety for the

husband or a stranger, on the predicate that, by creating the obligation, she must have meant to appoint its payment out of her separate estate, as that was the only mode in which she could give it effect. 2 Story's Eq. Jur., §§ 1399-1402. There seems to be a tendency in some of the later cases to repudiate the reasoning founded upon the idea of an appointment; its fallacy was exposed in a late case by Lord COTTINGHAM. If a married woman makes several notes, of different dates, and to different persons, on the theory of an appointment, they ought to be paid in the order of their date, whereas the equity courts have never recognized any such preference. Perhaps the sounder view is, that the chancery courts will treat all debts contracted by herself or for her account, and with her consent, whether written or verbal, as enforceable out of her separate estate. *Murray v. Barlee*, 3 Myl. & K. 209; 2 Craig & Phil. 48; *Gardner v. Gardner*, 22 Wend. 526; *Enmons v. Overton*, 18 B. Monr. 649; *Petty v. Malier*, 14 id. 247. In 18 id. 301, *supra*, the court declined to enforce the contract of the wife as surety for the husband, because it was "*strictæ juris*," the surety does not participate in the consideration; it arises upon signing the obligation, and in no wise connects itself with what is antecedent. *Straton v. Rastall*, 2 D. & E. 370; *Stratton v. Hale*, 2 Brown's Ch. 382, 383; *Rees v. Herrington*, 2 Ves. Jr. 542; 3 Wil. 359; *Ludlow v. Simond*, 2 Caines' Cas. in Error, 1.

In *Daniel v. Robinson*, 18 B. Monr. 301, the property was conveyed to the wife "for her sole and separate use." The statute was, that the separate estate could not be incumbent or sold only by order of a court of equity, and that for exchange and reinvestment. It was held that her debts were not chargeable on the estate, her disposition only extended to the income.

The statutes are enabling in so far as they retain to the wife the possession and control of her property, and the use and benefit of its income. To that extent they relieve from the disability of coverture. As to the income and profits, she is under no restriction. She may lease her lands, but cannot sell or mortgage them, except by joint deed of her husband and herself (perhaps as to movable effects and choses in action she may sell or assign them at pleasure). These statutes are restrictive of the equity doctrine that a wife may charge and dispose of her separate property as a *feme sole*. If the property was hers absolutely, at the date of the marriage, the statute withdraws it from the control of the husband

and she holds it, subject to the restrictions of the law, if she acquires it afterward. The law impresses itself as conditions of her tenure, unless the instrument creating the estate otherwise provides. We understand the doctrine in this State to be that a married woman (unless the instrument creating her estate otherwise provides) holds separate property, whether owned at her marriage or acquired since, as if the 23d, 24th, 25th, 26th and 27th articles of the Code, pp. 335, 336, were embodied in an instrument conferring the property upon her; these define the nature and extent of her estate, her ability to sell and dispose of it, and her power to charge or bind it for debts. This separate property "consists of real and personal estate, money, rights and credits." "Of every species and description of property." Art. 23, *supra*. It is this separate estate, whether in the form of lands, personal effects or credits, that she may dispose of and alien, or charge with debt, provided each be done according to the terms of the law. If she make a mortgage to secure a "debt contracted for necessities for herself and children, or for their education," the mortgage is of no effect unless the husband join in it; while the debt, being such as she may contract, may be recoverable out of her property. There is no room for the application of the equitable doctrine, that, by virtue of general contracts and engagements to pay money, she charges, or is deemed as intending to charge, her estate, for the statute, which is as if conditions of her tenure or limitations upon her power over the estate, defines in how far she can act as a *feme sole*, and declares that to that extent she shall charge her property, and by necessary implication negatives every other mode or any greater extent. If an instrument empowers a married woman to dispose of property by a deed, attested by two witnesses, * * * a deed attested by one will not suffice. *Montgomery v. Agricultural Bank*, 10 Smedes & Marsh. 576. Not because the law requires two witnesses, but because the power was prescribed to be executed in a particular way. So, if the statute declares that she may charge her estate with a certain class of debts, contracted for certain enumerated purposes, it is to the exclusion of all others.

The married woman's law of 1839 gave no power to the wife to impose a debt on her separate estate which consisted only of lands and slaves. In *Davis v. Foy*, 7 Smedes & Marsh. 67, speaking of the statute, the court say "that its effect is rather to take away all power of subjecting her property to her creditors, except in the

Bank of Louisiana v. Williams.

particular mode specified in the statute." In *Frost v. Doyle*, id. 76, the court declare the purpose of this legislation to be to limit the rule in equity that the wife is a *feme sole* as respects her separate estate, and that its object would be defeated by holding that she could charge the separate estate by note or bond. The cases of *Berry v. Bland*, id. 83, and *Davis v. Gisk*, 9 id. 151, commenting on the power which a wife has over property settled upon her by deed or will, in accordance with *Morgan v. Elam*, 4 Yerg. 375, and *Doty v. Mitchell*, 9 Smedes & Marsh. 435, on the same point, seem to hold the rule to be, that she has no power except what the instrument imparts, and that she is a *feme sole* only so far as she stipulates for exemption from common-law disability. This places her upon narrower ground than the English and the American courts generally assign her. The cases of *Garrett v. Dabney*, 27 Miss. 343, and *Block v. Cross*, 36 id. 558, dissent from the doctrine of the cases in 7 and 9 Smedes & Marsh., *supra*, and place the rule here in accord with the reason and authority of equity courts generally, viz.: "that if the instrument is silent as to her power over the property, neither restricting nor prescribing the mode of charging or disposition, the power is absolute, and she deals with it as a *feme sole*. Such is, doubtless, the true doctrine. Equity treats her as an owner, unembarrassed by coverture." *Curl v. Compton*, 14 Smedes & Marsh. 58; *Dallon v. Murphey*, 30 Miss. 65; *Russ v. Wingate*, id. 445; *Stamps v. Green*, 33 id. 546; *Steadman v. Holman*, id. 551; *Scott & Gray v. Pope & Eaton*, 35 id. 117; *Whitworth v. Carter*, 43 id. 61; *Dunbar v. Meyer, Deutch & Co.*, id. 679; *Bacon v. Bevan*, 44 id. 293; *Foxworth v. Magee*, id. 430; *Anderson v. Gregg*, id. 170, give utterance to the same reading of the statute. Article 910 of the Louisiana Civil Code conforms to the current of modern jurisprudence: "The law is obligatory on all the inhabitants of a State, foreigners while residing there, and upon property within its limits." In the *Bank of Louisiana v. Farrar*, 1 La. Ann. 49, the note and mortgage were dated in Mississippi, but the paper was made payable in Louisiana, and the mortgaged property was situated there, so that it was, in legal effect, a Louisiana contract, and as such dealt with by the court. Article 2412 is to the effect that the wife cannot bind herself conjointly with the husband for debts contracted, before or after marriage, by him. As we understand by the general law of Louisiana, a wife, with the consent and concurrence of her husband, can only bind

Porterfield v. Butler.

herself where the consideration inures to herself or her estate. *Partee v. Silliman*, 44 Miss. 282, and cases there cited. It may be observed that article 2412, *supra*, was enacted into law subsequent to the date of the charter of the bank. It was held, however, in *Farrar's case*, *supra*, that it did not repeal the thirty-second section of the charter. It thus appears that the special law under which this contract was made is in derogation of the general law, and ought, therefore, to be construed strictly, and not carried beyond its reason and policy.

We have reached the conclusion that this contract (on the case made in the record) is not obligatory on Mrs. Williams. Not, however, without difficulty and hesitation. We realize the importance of the principle and its practical effect in the community. This protracted discussion can only be excused, as it evinces an earnest desire to discover and announce the truth.

The judgment is affirmed.

PORTERFIELD V. BUTLER.

(47 Miss. 166.)

Consideration — promise by feme sole to pay bill made during coverture.

In an action on a bill of exchange, accepted by a married woman in payment for property purchased by her, the defendant pleaded coverture at the date of the acceptance; replication that defendant, after her husband's death, promised to pay the bill. *Held*, that the replication was bad; the acceptance being void when made, there was no consideration for the subsequent promise.

ASSUMPSIT by Baxter J. Butler, for the use of Warren Mitchell against Julia Porterfield, to recover the amount of three several bills of exchange drawn by William Porterfield on Mrs. Julia Porterfield, and accepted by her, payable in four, six and nine months, respectively, to the order of J. J. Robinson, in "payment of the steamer Emma Belt," each for the sum of \$1,833.33, and dated July 11, 1859.

To the declaration, the defendant pleaded her coverture with
VOL. XII. — 42

William Porterfield, at the date of the execution of the bills of exchange. The plaintiff replied, that the several acceptances were given by defendant in part payment of the steamer Emma Belt, purchased by her, and held and owned by her as her separate property; and that, at the time defendant gave those acceptances, she was the owner of a large amount of other property in her own right, and as her separate property; and, 2d. That the plaintiff, since the death of said William Porterfield, late husband of said Julia Porterfield, and while she was sole and unmarried, to wit: On the 1st day of January, 1866, admitted to plaintiff that said acceptances were all given by her in consideration of the purchase by her of the steamer Emma Belt, and were unpaid and just and due, and she then undertook and promised to pay plaintiff the several sums of money in the acceptances mentioned, when she should be requested, etc.

To the replications of plaintiff, the defendant demurred on the ground, first, that the allegations of the replications constitute a departure in pleading, and, second, because the replication sets up and exhibits against her new matters not set forth in the declaration.

The demurrers were overruled, whereupon the cause was submitted to a jury, who found for the plaintiff, \$7,124.

Simrall & Young, for plaintiff in error.

No counsel for defendant in error.

TARBELL, J. [after deciding questions of practice.] Do the pleadings on the part of the plaintiff in this case set forth a good cause of action against the defendant? This is a question of grave importance, yet susceptible of certain demonstration. Story on Contracts, § 468, defines the rule in this class of cases, which, upon a careful consideration of the authorities, correctly states the law. He says, "contracts merely voidable, and not void, in these inceptions, may be revived by a subsequent promise, provided they were originally founded upon an express or implied request by the party benefited; but where the promise is void, *ab initio*, it is not capable of ratification. Thus, where a married woman gave a promissory note, and after her husband's death, promised, in consideration of the forbearance of the payee, to pay it, it was held that the

Porterfield v. Butler.

note was absolutely void, and that forbearance, where there was no cause of action originally, is not a sufficient consideration to raise a promise. *Loyd v. Lee*, 1 Stra. 94; *Watkins v. Halstead*, 2 Sandf. 311. So, also, a bare promise by an adult to pay a bond given by him as surety during his infancy would not be a sufficient consideration, because the bond was void, and what is void in its inception cannot be made good by a ratification. *Keane v. Boycott*, 2 H. Black. 511; *Tucker's Lessee v. Moreland*, 10 Pet. 59. So, also, where certain goods were supplied to a *feme covert*, living apart from her husband, and for which she, after his death, promised to pay, it was held, that the subsequent promise was void, because the goods being supplied to her during the life of her husband, the price constituted a debt due from him, and not from her. *Littlefield v. Shee*, 2 Barn. & Adol. 811; *Meyer v. Haworth*, 8 Adol. & Ell. 467.

Opposed to this doctrine are the cases of *Lee v. Muggeridge*, 5 Taunt. 36; and *Vana v. Wells*, 8 Ala. 399. The former was decided in 1813, upon transactions originating in 1789. The pleadings presented a case wherein the court held there was a moral obligation, which was considered in the circumstances a good consideration for the promise. There was a marriage settlement, the property of the intended wife being placed in the hands of trustees, wholly beyond the control of the prospective husband, subject only to the orders, directions, and dispositions by will of the *feme*; marriage; a loan of money to the wife, at her solicitation, to aid a member of her family; a bond by the *feme covert* obligating herself and her legal representatives; the death of her husband; a letter from the widow, pledging her executors to pay the money; her will directing her debts to be paid; and an action against her executors, with judgment for plaintiff. The court placed its decision upon the ground that the case made out was one where there was a moral and conscientious obligation, comparing it to the case of *Barnes v. Hedley*, 2 Taunt. 184, which was a debt void for usury; but the money had been actually loaned and advanced; the parties by agreement stripped the transaction of its usury, reducing the debt to the real sum loaned, with legal interest; and thereupon a promise to pay; held, a valid and binding promise.

The opinion in *Vana v. Wells* is rested solely upon the case of *Lee v. Muggeridge*, without a reference to other authorities, if not without very mature consideration, as the facts of the two cases

are very unlike, and the latter advances views to which we should be slow to give our assent. But the doctrine of *Lee v. Muggeridge* has been questioned by later decisions, and it is regarded, as it is, an exceptional case. We are of the impression from a careful study of that case, that the conclusion reached was greatly influenced by the terms of the instrument by which the wife held her separate property.

Lord TENTERDEN, C. J., in *Littlefield v. Shee*, 2 Barn. & Adol. 813, referring to the case of *Lee v. Muggeridge*, said: "I must also observe, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation." In a note to *Wennall v. Adney*, 3 Bos. & Pul. 249, it is said, "An idea has prevailed of late years that an express promise, founded simply on an antecedent moral obligation, is sufficient to support an *assumpsit*. It may be worth consideration, however, whether this proposition be not rather inaccurate, and whether that inaccuracy has not in a great measure arisen from some expressions of Lord MANSFIELD and Mr. Justice BULLER, which, if construed with the qualification fairly belonging to them, do not warrant the conclusion, which appears to have been rather hastily drawn from them." Proceeding in a lengthy note to review the decisions on the subject, it is further stated in the same note: "Indeed it is clear from *Loyd v. Lee*, 1 Stra. 94, and *Cockshott v. Bennett*, 2 T. R. 763, that if a contract between two persons be *void*, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract. Yet according to the commonly received notion respecting moral obligations and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." The note concludes: "that an obligation to pay in one right, even though it be a legal obligation, and coupled with an express promise, will not support an *assumpsit* to pay in another right."

Lord DENMAN, in *Eastwood v. Kenyon*, 11 Adol. & Ell. 438,

approves of the foregoing note, and says : " that the case of *Lee v. Muggeridge* must be allowed to be decidedly at variance with the doctrine " of that note. He also regards the expressions of Lord TENTERDEN in *Littlefield v. Shee* as amounting to a dissent from the authority of *Lee v. Muggeridge*, and he further seems to think it remarkable that neither in the latter case, nor in *Cooper v. Martin*, 4 East, 77, was there any allusion made to the learned note referred to and quoted above.

The doctrine of the foregoing note is quoted and approved in *Geer v. Archer*, 2 Barb. 420. It also received the emphatic approbation of Mr. Justice SPENCER, in *Smith v. Warde*, 13 Johns. 257. The same doctrine is substantially asserted by BRONSON, J., in *Ehle v. Judson*, 24 Wend. 97, and such is declared to be " the settled rule " in *Geer v. Archer*, in which the court say : " It forms a criterion at once safe, certain, and easy to be understood and applied. " In that case, it is said, the test is, " could it not have been enforced before it was barred by the legal maxim or statute provision ? " *Watkins v. Halstead*, 2 Sandf. 311, was an action against a *feme sole* upon a promise after discovery to pay for goods purchased while a *feme covert*. In an opinion showing an examination of all the authorities, the court say : " The idea cannot be tolerated, that a precedent consideration can support a subsequent express promise, when the law not only cannot raise any implied promise from such a consideration, but where even the express promise, made when the consideration originated, would be void, " and the opinion concludes : " On the whole, we are of opinion that the precedent consideration in this case cannot support the subsequent promise ; and we hold with Lord TENTERDEN, in *Littlefield v. Shee*, 2 Barn. & Adol. 813, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. "

Story on Contracts, § 466, referring to the rule as to moral consideration, says : " A qualification to this rule, however, obtains in cases where there was originally a sufficient valuable consideration, upon which an action could have been sustained, but where, in consequence of some statute or positive rule, growing out of general principles of public policy, the right of action is suspended, and the party is exempted from legal liability. In such cases, the moral obligation is sufficient to support an express promise, though it will not raise an implied promise ; " and he says : " This exception

includes all promises barred by the statute of limitations or discharged by the bankrupt or insolvent law; and promises by an adult to pay debts contracted during his infancy; and promises by a drawer of a bill of exchange, or by an indorser of a bill or note, to pay it, although he may not have received such notice as would render him legally liable therefor;" but between these cases and the one at bar there is a clearly defined distinction.

The court in *Mills v. Wyman*, 3 Pick. 207, observes: "It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly, but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation which has become inoperative by position of law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule." Unlike these cases, in one at the bar, as in *Geer v. Archer*, "the supposed obligation which is invoked in support of the promise is most clearly one which never could have been enforced in any tribunal known to our law," and herein lie the true grounds of defense to this action. The contract sought to be revived and enforced is void, *ab initio*, void at the common law, and void, as unauthorized by statute, nor is there resting upon the defendant any moral or conscientious obligation to perform the original undertaking. A *feme covert* can acquire property under our laws only for cash, and the purchase of a steamboat on credit is so entirely contrary to the spirit of recent legislation for the protection of married women, and so clearly unauthorized by the enabling acts of the last few years, that such a transaction fails to commend itself to the favor of the courts, or to impose a claim upon the conscience of the party.

By all the text writers and adjudications, a void contract is incapable of revival and ratification by a subsequent promise. *Loyd v. Lee*, 1 Strange, 94, and cases therein cited; *Eastwood v. Kenyon*, 11 Adol. & Ell. 442, and cases; Chitty on Cont. (4th Am. ed.) and cases cited in notes; Greenl. Ev., § 107; Addison on Cont. 11, 74, 702; Tyler on Infancy and Coverture, 444, § 317; Story on Bills of Exchange, § 182; *Nash v. Russell*, 5 Barb. 556; *Goulding v. Davidson*, 26 N. Y. 604. And this is the sum of the argument. To this rule there cannot be said to be exceptions

strictly, though there are exceptional cases. Such was the case of *Lee v. Muggeridge*, 5 Taunt. 36. *Barnes v. Hedley*, 2 id. 184, was not by any means exceptional, for there the original undertaking being usurious, the parties destroyed the evidence of the indebtedness, and another note was given for the money actually loaned, constituting a new, independent, and valid arrangement, based upon a valuable consideration. Were the steamboat for which these bills of exchange were accepted, now in existence, and in the possession of the defendant in the action; and were the parties to destroy these acceptances, and in their stead, substitute other evidences of indebtedness, pursuant to a new undertaking, this case would then be more nearly like that of *Barnes v. Hedley*. *Goulding v. Davidson*, 26 N. Y. is exceptional, but does not militate against the doctrine herein advanced. In that case a *feme covert* was a sole trader, representing herself to be a *feme sole*, buying and selling goods as such, without any knowledge on the part of her creditors that she had a husband living. Her business was under her own exclusive control, and for her sole benefit. Being indebted for goods thus bought and sold, she executed her notes. Afterward and before suit, her husband died, after which she promised to pay. To a declaration setting forth these facts, she demurred, and the court of appeals directed a judgment for the plaintiff on the demurrer, the defendant, of course, having leave to plead. Opinions were delivered by three of the judges of the court, one of whom said the recent changes made by the legislature in the law affecting husband and wife were inapplicable to the case, and he said further, "I will add that the fact is controlling with me, that the defendant personally received a valuable consideration for the money she has promised to pay;" while the third based his opinion expressly upon the statutes of New York, passed in 1849, in respect to the rights of married women, the transactions involved in the litigation having taken place in 1852. The facts were exceptional, and presented a case wherein there was clearly a moral and conscientious obligation resting upon the defendant to pay. Trover or replevin were manifestly the proper remedies of the vendors in that case, but being ignorant of the existence of the husband until too late to resort to those actions, suit was brought upon the notes, setting out all the facts, including the subsequent promise, and the court held the cause of action, stated in the declaration, a good one, or, as we infer, *prima facie* suffi-

cient only. Judge BALCOM in his opinion said : " I am aware the general rule is that a moral obligation is not alone sufficient legal consideration to support a promise," and referring to the rule given in the note to 3 Bos. & Pull. 249, added : " But this rule is too broad, or at least there are exceptions to it." And we may remark of that whole case, that it was exceptional, involving a claim binding upon the conscience of the party, peculiarly meritorious and just. In *Nash v. Russell*, 5 Barb. 556, the rule is reported as sound, that " A mere moral obligation, though coupled with an express promise, is not sufficient consideration to support a bill between the same parties." It was held in *May v. Sperry*, 6 Cush. that a note, promise, or debt, is not destroyed by a discharge in bankruptcy, and if it were, say the court, " it not only could not be revived or renewed, but it could not be a consideration for a new promise." In the class of cases to which the one at bar belongs, the action is based upon the subsequent promise, whereas, in the cases capable of ratification or revival, the action and judgment must be upon the original contract or indebtedness. 6 Cush. 242; Story on Bills of Exchange, § 182, states the doctrine under discussion with exact precision : " It has, indeed," says the learned author, " in some cases been broadly laid down, that where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. But this doctrine must be received with many qualifications, and is now restricted to much narrower limits. The true doctrine, as now established, seems to be that a consideration, which the law esteems valuable, must in all cases exist, in order to furnish a just foundation for an action." And in illustration of this doctrine the author further says : " Where there is a precedent duty, which would create a sufficient legal or equitable right, if there had been an express promise at the time, or where there is a precedent consideration, which is capable of being enforced, and is not extinguished, unless at the option of the party, founded upon some bar or defense, which the law justifies, but does not require him to assert, then an express promise will create or revive a just cause of action." In further illustration, cases of infancy, statutes of limitation, and discharge in bankruptcy, are cited : " So," he continues, " if a contract is voidable, but founded in a consideration otherwise valuable, a sufficient or express promise to pay it will support and confirm its obligation,

Porterfield v. Butler.

but not if it be originally void." And "a promise by a woman, who is sole, to pay a debt which she had previously contracted, while she was married and under coverture, would not be valid, because such a contract, on her part, is *ab origine* void, and not merely voidable."

Kennerly v. Martin, 8 Mo. 698, was a suit by a physician to recover the amount of a bill for professional services rendered in part to the slaves of the defendant, during the life of her husband, basing his right of action upon the express promise of the widow, after the death of her husband. The court said: "there are cases in which a moral obligation has been considered a sufficient consideration to support a subsequent express promise to pay," but that "the promise must be unequivocal, and the declaration must set forth all the circumstances, and must show that the money is in conscience due." In that case, it was held that there was no moral obligation whatever, for the defendant to pay a debt contracted during her husband's life-time, and judgment was rendered for the defendant.

Vide, Chit. on Cont. (4th Am. ed.) 40, 40 *a*, and cases cited in notes, where the foregoing doctrines are reported. *Cook v. Bradley*, 7 Conn. 57.

The question of moral obligation as the basis of a promise to pay is one upon which the courts have been unable to lay down a definite, or even a satisfactory rule, and we shall not undertake to reconcile the multiplicity of cases and conflict of views, as the question does not at present arise upon the record before us. The case presented is one not only void at the common law, but contrary to the policy and spirit of the legislation of this State, for the protection of the property of married women.

Counsel in his argument has referred to the probable action of a court of equity, where the steamboat, for the purchase price of which these acceptances are alleged to have been given, is in existence, and in the possession of Mrs. Porterfield. Undoubtedly, in a proper proceeding, the property would be decreed to be sold in payment of the purchase-money, or to be delivered to the vendor.

This suggestion of counsel opens a wide field for investigation, not arising in this case, and not intended to be invaded in this discussion. It is sufficient to say, that an attempt in equity to charge this claim upon the estate of Mrs. Porterfield would meet with no less serious obstacles than in a court of law, as the case is wanting

Sublett v. Bedwell.

in the elements to charge her estate. *Yale v. Dederer*, 22 N. Y. 450; *Tyler on Inf. and Cov. 444 et seq.*; *White v. Story*, 43 Barb. 124; *Caldwell v. Sawyer*, 80 Ala. 283; *Major v. Symmes*, 19 Ind. 117; *Hicks v. Johnston*, 24 Ga. 194.

The judgment is reversed and cause remanded.

SUBLETT V. BEDWELL.

(47 Miss. 206.)

Election — where candidate receiving the highest vote is disqualified — failure to elect.

At an election the person receiving the highest number of votes was disqualified. The person who had received the next highest number, and who was qualified, claimed the office. *Held*, that the electors had failed to make a choice, and that he was not entitled to the office. (*See note, p. 841.*)

PROCEEDINGS by J. M. Sublett in contestation of the election of S. G. Bedwell to the office of chancery clerk of Yazoo county, commenced before a justice of the peace. A trial was had before a jury, and a verdict was returned in favor of Sublett. Bedwell appealed to the circuit court, when the verdict was set aside and the cause dismissed for want of jurisdiction in the justice of the peace. From that decision the case was brought to this court.

The petition alleged that Sublett at said election obtained the highest number of legal votes; that Bedwell was disqualified to hold the office of chancery clerk by reason of the fact that he was one of the registrars of voters in the county at the said election. The evidence showed that Bedwell received a majority of the votes cast, and that Sublett received the next highest number of votes.

The court, after deciding that the justice of the peace had jurisdiction, and that the circuit court erred in reversing the verdict and dismissing the case for want of jurisdiction, proceeded as below:

R. S. Hudson, W. H. Luse, R. Bowman & J. A. F. Campbell,
for plaintiff in error.

Garnet Andrews, Jr., for defendant in error.

Sublett v. Bedwell.

SIMRALL, J. The questions arising in this contestation have been elaborately discussed in all their bearings, and as the case will be remanded to the circuit court, it may be proper now to state the conclusions to which we have come.

It is claimed for Sublett that, although Bedwell received a majority of the votes cast, yet he (Sublett) is entitled to the office, because the votes cast for Bedwell are illegal, he being under a prohibition to become a candidate at that election, holding the office of registrar, and participating in determining who were competent electors to vote thereat. Concede that Bedwell was ineligible for that reason, would it follow that Sublett would be entitled to the office? The foundation of our system of government reposes upon the ultimate sovereignty of the people. Those who exert authority and discharge the functions of government in any of the departments among which its powers are distributed, come into existence and perform the functions respectively assigned them, according to the modes prescribed by the people in the organic law, framed by their representatives and adopted by themselves. When they reserve to themselves the selection of a class of officers by popular election, a fundamental principle (unless otherwise expressly provided) is, that the person receiving a majority of legal votes over his competitor is entitled to the office. It cannot be said that the candidate has been elected unless he has received a majority of the legal votes cast; he is not the choice of the people. If the majority make choice of a candidate under some personal disability, disqualifying him from taking and enjoying the office, the utmost that can be said of it is, that there has been no election. The election, by a majority or plurality of the votes (as the law may be), is the foundation of the "right" to the office. The certificate or the commission is only evidence of that fact.

If the majority candidate is disqualified, it does not follow that he who has received the next highest vote and is qualified shall take the office. The election laws are framed on this theory: The registrars or inspectors, upon a canvass of the ballots, give the certificate to the person who has the largest vote. So the jury in contestation cases find who has received the largest number of legal votes. The general principle pervading our election system is, that the highest vote entitles to the office, if its recipient can take. There is by implication a negation of the office to the minority candidate, in all cases, except those covered by the last section of the schedule

to the constitution (section 15). That section in its operation will be temporary. (For we hope and believe that the condition of affairs out of which it arises will never again be repeated in our future history.) It was intended to provide for a crisis. Its motive was to exclude from public places and trust those who had participated in the late rebellion, and who were under peculiar obligations to the United States to observe faith and allegiance to them — the exclusion, however, not to be permanent, but only for such time as congress should choose to keep such persons under disability. The section has now almost ceased to have effect, congress having so far interposed relief as that it does not now apply to perhaps as many as twelve of our citizens. The section is as follows:

“If any candidate receiving the highest number of votes cannot take the oath of office prescribed in this constitution, then the candidate receiving the next highest vote shall be entitled to enter the office,” etc. Among other particulars prescribed in the oath of office is, “that the (person) is not disqualified from holding office by the constitution of the United States or the State of Mississippi.” The convention, doubtless, had especial reference to the third section of the fourteenth article of amendment of the constitution of the United States, excluding from holding office those who had taken an oath as an officer under the United States or any State to support the constitution of the United States, and had engaged in insurrection or rebellion against the same.”

The constitution does establish the rule that votes cast for a person *thus* disqualified are void and of no effect, unless the disfranchisement has been removed. The practical interpretation put upon the section has been, that it is a personal disability to “hold office,” and if that be removed before the term begins, the election is made good, and the person may take the office. In this special case the constitution adopts the English rule, that votes cast for an ineligible candidate are thrown away, and those only are available which are given to the eligible candidate; but this only shall be applied to those who “cannot take the prescribed oath.” No other disability works this result. If a person who is ineligible for any other reason — as for want of age, not twenty-one, to qualify for a representative, or twenty-five years of age, to qualify for senator; or has not resided in the county and State the prescribed time, or who is by some special statute made ineligible — in these and such cases

Sublett v. Bedwell.

votes cast for these persons are not void, because the constitution does not say that the candidate receiving the next highest vote shall enter upon the office. Such disabilities are not embraced in the terms of the fifteenth section of the schedule, nor are they within its reason and intendment.

That section was meant to make it impossible, so long as the disability continued, for the class of persons, therein more especially referred to, to participate in the government by holding its offices. Votes cast for those who may be under other disabilities are valid or not valid under the general law.

Without going into the general reasoning, the great weight of American authority, and, as we think, upon the soundest consideration, is, that although the majority vote for a disqualified person, the votes so cast are not illegal, and therefore to be treated as naught; but the result is, if the ineligible candidate cannot take the office, the electors have failed to make a choice. In truth, there has been no election at all, and the minority candidate has no right to the office. *State of Georgia v. Swearingen*, 12 Ga. 24; *State ex rel. of Off. v. Smith*, 14 Wis. 497; *State v. Giles*, 1 Chand. 112; *Saunders v. Haynes*, 13 Cal. 152; *The Answer of the Supreme Court of Main*, 38 Me. 597. The case of Vance and Abbott in United States Senate, recently, was considered upon its legal merits and decided in accordance with the great weight and merit of American judicial adjudication.

We are of opinion, therefore, that if Bedwell, who received the majority of votes, could not take and hold the office, the petitioner, Sublett, would not be entitled to it as the recipient of the next highest vote.

[The court then decided that under the statute Bidwell was not competent to take the office.]

NOTE. — The question presented in this case was very fully considered by the Court of Appeals of New York, in *People v. Clute*, 10 Am. Rep. 508; 50 N. Y. 451; and it was held that in the absence of proof that the electors who voted for an ineligible candidate were aware of his ineligibility, the candidate receiving the next highest vote could not claim the election; and that the fact that the disqualification was created by statute created no presumption of such notice.

The doctrine of the principal case is in accordance with that laid down by the supreme court of California in *Saunders v. Haynes*, 13 Cal. 145. In that case BALDWIN, J., in delivering the opinion of the court, said: "An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their vote upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. If this be so, a candidate might be elected who

LAWSON v. JEFFRIES.

received only a small portion of the votes, and who could never have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next highest to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should in effect be counted for the former, who, possibly, could not have received them. It is fairer, more just, or more consistent with the theory of our institutions to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will and electing to office a man whose pretensions the people had designed to reject."

To the same effect are *State v. Giles*, 1 Chand. 112; *State v. Smith*, 14 Wis. 497; *Commonwealth v. Culey*, 56 Penn. St. 270. And see opinion of the judges, 38 Me. 597; *State v. Boal*, 46 Mo. 528.

On the other hand, it was held in *Gulick v. New*, 14 Ind. 93, that if the electors have notice of disqualification of a candidate the votes cast for him are nullities, and that the candidate having the next highest vote will be elected; and, further, the fact that the disqualification is constitutional, or arises from the candidates holding or having held a public office is sufficient notice thereof. To the same effect is *Carson v. McPhetridge*, 15 Ind. 427. This is also, except the point as to notice of the English doctrine. *Rez v. Parry*, 14 East, 549; *Rez v. Bridge*, 1 M. & S. 76; *Regina v. Coake*, 28 Eng. L. & Eq. 304; 7 Q. B. 406; and see the cases cited in *People v. Clute*, 10 Am. Rep. 508. — REP.

LAWSON v. JEFFRIES.

(47 Miss. 686.)

Constitutional law -- ordinance of constitutional convention granting new trials void.

A constitutional convention passed an ordinance granting new trials in certain cases. *Held*, that the ordinance was not a legislative act, and was void.

THE case is stated in the opinion.

W. P. Harris and *George L. Potter*, for plaintiff in error.

John Handy, for defendants in error.

TARBELL, J. In 1862 a decree was rendered in the probate court of Warren county against the plaintiff in error, as executrix of the estate of H. A. H. Lawson, deceased, in favor of the defendants in error, as distributees of the estate of Walter R. Puckett, deceased. In 1863 the said Mary V. Lawson filed in the chancery court of Madison county her bill of complaint, praying that the said decree be set aside and a new hearing granted. On the 7th

Lawson v. Jeffries.

day of April, during the April term, 1865, of the Madison county chancery court, the injunction granted in the last-named cause was dissolved and the bill dismissed. From this decree no appeal was taken or attempted, as far as appears.

On the 29th day of April, 1868, the constitutional convention of that year passed an ordinance, of which the following is a copy of section 1 :

“Be it ordained by the people of the State of Mississippi, in convention assembled, that in all cases where judgments in the circuit courts and decrees in the chancery or probate courts of this State have been rendered since the 9th day of January, 1861, and prior to this date, the party against whom such judgment or decree has been rendered, whether in a representative capacity or otherwise, shall be entitled to a new trial upon filing an affidavit that he or she had no attorney or counsel present at the time of the rendition of said judgment or decree, and that he or she believes that said judgment or decree is unjust.” This ordinance was not submitted to the people. On the 16th day of March, 1870, a motion was entered in the chancery court of Madison county, under the ordinance above quoted, to set aside the decree of April 7, 1865, and for a rehearing, which motion was overruled by the chancellor at a regular term of the court in July, 1870. From the decree overruling the said motion, an appeal was taken to this court.

The question for our determination is as to the force and effect of the ordinance upon which the motion overruled was based. The question, whether the judgments to be affected are few or many, is of the very first magnitude, and is supposed, by the arguments of counsel, to involve, directly or remotely, the validity of the acts of the confederate authorities; the powers of a constitutional convention; State and federal constitutional provisions with reference to property, vested rights, contracts and due process of law, and the force and effect of retroactive laws.

As before stated, the decree sought to be opened in virtue of the ordinance of the convention of 1868 was rendered April 7, 1865. The suspension of the statute of limitations, by the act of December, 1862, expired April 2, 1867.

Conceding this statute to apply to bills of review and appeals, which it does not in terms, the time to file a bill of review expired April 7, 1869 (if not April 7, 1867), and the limitation of appeal terminated April 7, 1870 (if not April 7, 1867), the period within which

a new trial or a rehearing could be had by application to the court rendering the judgment or decree, had long before passed. In 1870, when the motion, the decree overruling which is under review, was made and decided, the constitution framed by the convention of 1868 had been ratified, and the State government organized thereby was in full operation. As to the decree sought to be annulled by ordinance, the court had full jurisdiction of the cause and the parties. At the date of the passage of the ordinance, it was too late to obtain a new trial or rehearing by application to the court rendering the judgment or decree. The time within which to file a bill of review had also expired. But there was, perhaps, then open to the party the right of appeal. *Griffing v. Mills*, 40 Miss. 611. In all other respects, the rights of the parties had become fixed by the then existing laws of the State.

The constitutional convention of 1868 assembled under the authority of the laws of congress, popularly known as the reconstruction acts of 1867. These acts conferred upon the convention power only to frame "a constitution of government in conformity with the constitution of the United States in all respects." Act of March 2, 1867. "And said convention, when organized, shall proceed to frame a constitution and civil government, according to the provisions of this act, and the act to which it is supplementary." Act of March 23, 1867. Although, as incidental thereto, section 8 of the last-named act provides, "that the convention for each State shall prescribe the fees, salary and compensation to be paid to all delegates and other officers and agents herein authorized or necessary to carry into effect the purposes of this act, not herein otherwise provided for, and shall provide for the levy and collection of such taxes on the property in such State as may be necessary to pay the same." At the time of the assembling of the convention, and the passage of the ordinance under consideration, the "fourteenth amendment" to the constitution of the United States, which ordains that no State shall "deprive any person of life, liberty or property without due process of law," though not formally declared adopted until July, 1868, was, if not of itself, substantially the law of the land in other provisions of the federal constitution, so far as concerns the case at bar. Amendments to Const. U. S., art V.

With these preliminary statements, we are prepared to advert to our theory of the true solution of the question before us, our con-

clusion being based upon a most extended and patient examination of all the authorities within our reach. Upon such research, we are of the opinion that the ordinance above quoted is a judicial, and not a legislative act, and therefore unauthorized.

Adding the authorities consulted, we might here conclude this opinion; but the importance of the question involved, and its novelty in the jurisprudence of our State, lead us to a brief elucidation of the subject as it presents itself to us. In doing this, we observe that the question in this case does not involve the power of a legislative body to enact retroactive laws; to give the right of appeal, or authority to the courts to entertain bills of review, whereby the then existing laws, the time within which to appeal or to file a bill of review, has passed; or, in a class of cases where no such right has before existed; nor, whether a legislative body can confer a discretion upon the courts to grant a new trial; but the proposition to be solved is, whether a constitutional convention, or any legislative body can, by an ordinance or statute, award a new trial absolutely. It is not material whether, in this case, the issue had passed into judgment, and beyond the time allowed for an appeal or writ of error; or for a motion for a new trial or rehearing before the court rendering the judgment or decree.

The question presented being essentially peculiar to a country of constitutions and laws, the authorities referred to are exclusively American, and are found in three different periods of our history, viz.: 1. Pre-revolutionary; 2. From the adoption of the federal constitution to the late rebellion; 3. Adjudications to which reconstruction has given rise. (1.) Prior to the adoption of the federal constitution, certain of the State legislatures combined the character of a legislature and a court, exercising the powers of both. (2.) With the supremacy of the federal compact then obtained, the American policy or law of distributing the functions of government into executive, legislative and judicial departments, and prohibiting the exercise of the duties of one by the other, or by either of them. (3.) Reconstruction, as a necessity of the late war, was altogether novel, and the problems thence arising, anomalous. The first period furnishes, for the ordinance in question, but one precedent, fully referred to hereafter. During the second period we are not aware that judicial acts were ever successfully exercised by a legislative body, whether a legislature or a constitutional convention. Indeed we are not aware that,

during this period, judicial powers were ever assumed by a constitutional convention, though our means of information are not as ample as we could wish. Constitutional conventions, however, are recognized as possessing provisional, limited and preliminary powers of legislation; such, only, was the case of the *Com. v. Dewdell*, 1 Va. Cases, 7; but they are not known, any more than legislatures, to have exercised the judicial authority properly cognizable by courts of law. In short, the doctrine did not obtain that a convention of the people for the purpose of establishing a new, or of remodeling an old, constitution any more than a legislature acting under the fundamental law could perform judicial acts. Where attempted by legislatures, such acts have been resisted, denounced and generally defeated. In the older States the courts have been exceedingly tenacious of the rights of the respective departments of government, and particularly zealous of the legislative encroachments upon the jurisdiction of the judiciary; illustrated in a case where a resolve of the legislature of Massachusetts "empowered" a judge of probate to take an administration bond in a mode differing from that prescribed by the general statutes, in which the court said: "It is not imperative, and if it were it would be unconstitutional." *Picquet's Case*, 5 Pick. 65. The period of reconstruction furnishes abundant evidence of the absence of consultation and concert between the conventions, legislatures and courts of the several reconstructing States upon the grave questions presented by the situation. The result is a diversity of measures and decisions, as wanting in harmony and uniformity as in consistency and commanding precedents. It is understood that, at an early day, the policy of Louisiana indicated the extreme of the theories of reconstruction, as to some of the questions involved; but those views failed to be controlling. 20 La. Ann. 152, 199, 234, 254, 412. The decisions of the courts of Alabama are construed to be flatly contradictory upon leading measures growing out of reconstruction in that State. 44 Ala. 171, 178, 418, 554, 248; 41 id. 153; 40 id. 547; 43 id. 173, 224, 434. The adjudications granting new trials in causes which had passed into judgment in the confederate courts, proceeding, as we understand them, upon the idea of a discretion confided to the reconstructed courts (44 Ala. 177, 248); which is not the theory of the ordinance under consideration, nor the theory of the same subject in Georgia, Florida or Arkansas. In Arkansas the decisions are also conflicting. 24 Ark. 286; id.

Lawson v. Jeffries.

545, 586, 598. *Hawkins v. Filkins*, 24 Ark. 28, was decided with reference to an ordinance of the convention of 1864, while the cases in 26 Ark. were under the later and not much different provisions of the convention of 1868. But the question there was as to the validity of judgments of the confederate courts, and not the right by an ordinance to grant a new trial. The convention of Florida promulgated an ordinance annulling judgments and granting new trials; but, upon appeal to her courts, these provisions were declared void. In fact, in that State, the terms of such an ordinance were inserted in the constitution, which was ratified by the people; yet the provision was held by the courts to be void. Am. Law Reg. Oct. 1871, vol. 10, No. 10, p. 647, note. In Georgia, the obstacles to annulling judgments and granting new trials by ordinance or statute were evidently appreciated; and hence in that State there was no attempt to annul or open judgments directly. But it was provided that, as to judgments during the war, an issue should be made up to determine an asserted defense which a party had been deprived of interposing, and, in case of payment, set-off, or other defense, the amount found by the jury upon such issue was applied in reduction of the judgment, while its validity and lien remained undisturbed. This law was sustained by the courts, the proceeding being by petition in the nature of a bill in equity. Laws of Ga., 1860, No. 115, p. 133; 40 Ga. 493, 501, 698. Thus the period of reconstruction failed in establishing precedents of a character necessary to sustain the ordinance before us; but there are not wanting numerous adjudications during this time by the courts of the reconstructing States, holding that judicial acts by legislative bodies are illegal and void. 24 Ark. 91; *Aycock v. Martin*, 37 Ga. 158; *White v. Herndon*, 40 id. 493; 41 Ala. 153; *State v. Gleason*, 12 Fla. 191; 25 Ark. 625; *Griffin v. Cunningham*, 20 Gratt. 31; 43 Ala. 173, 224, etc. In fact, the decisions are uniform, not only in the Southern States, both before and since the war, but in every State in the Union, that a legislative body is not invested with authority to perform judicial acts.

The cases cited in support of the action of the convention of this State may be here briefly referred to. A single case is presented where the legislature of Connecticut, in 1795, granted a new trial in a cause wherein the time for appeal had passed; a few cases indicate the power of a legislature, by retroactive laws, to allow the right of appeal, where the time has expired, or never

existed ; and others are precedents for laws conferring upon courts a discretion to entertain bills of review, where the time to file them has passed, or where the right was not before provided for ; but these authorities are believed to be exceptional and special, or inapplicable to the case at bar, and in no way establish the doctrine contended for by the plaintiff in error. The earliest adjudication cited is that of *Colder v. Bull*, 2 Root, 350, decided in 1796. The legislature of Connecticut having granted a new trial in a cause in the court of probate, on appeal, the court of last resort said : "The power of granting new trials was ever exercised by the general assembly of this State ;" showing that the power was placed upon usage and custom, and the union of legislative and judicial functions in the legislature, or "general court," as the legislature was sometimes called. It is an important fact, that at the time the legislature of Connecticut granted the appeal in that case, their authority was derived from the charter. The people of the State had not then framed a constitution. Several of the judges, in giving their opinion, relied on this circumstance and the usage, showing that the legislature had long exercised this species of judicial power. Such was the view taken of that case in *Merrell v. Sherburne*, 1 N. H. 199, and *Lewis v. Webb*, 3 Me. 326 ; in both of which its authority, as a precedent, was questioned and disallowed. The legislature of Kentucky passed an act granting the right of appeal in a certain class of cases, making the law retrospective, as well as prospective. An appeal being taken in a case wherein there was either no right of appeal, or the time allowed for appeal had expired, which is not clear, the appeal was sustained, the court citing *Colder v. Bull*, only. *Henderson & Nashville R. Co. v. Dickerson*, 17 B. Monr. 173. But that is not the case at bar. *The Baltimore & Sus. R. Co. v. Nesbit et al.*, 10 How. 395, was this : The legislature of Maryland granted a charter to a railroad company, in which provision was made for the condemnation of land ; a jury to assess the damages ; confirmation by the county court ; and upon payment of the award of the jury, title to vest in the railroad company. Damages had been assessed and awarded, but neither payment nor tender had been made by the company. In this condition of the case, the legislature authorized proceedings *de nova*, and the law was sustained upon the ground that the proceedings were *in fieri* ; no title had been divested or vested ; and the right of the parties had not become

Lawson v. Jeffries.

fixed. The award was made in 1836. The rehearing was authorized in 1841, after a delay of five years on the part of the railroad company to pay or tender the award. *League v. DeYoung*, 11 How. 185, brought in question certain laws of Texas prior to her admission into the Union as a State, and the case is otherwise considered clearly not a precedent for the ordinance in question. *Watson et al. v. Mercer*, 8 Pet. 88, involved only the power of the legislature of Pennsylvania to cure, by subsequent legislation, a defective acknowledgment of a deed, otherwise *bona fide* and effective. *Satterlee v. Matthewson*, 2 id. 380, involved the validity of a law passed by the legislature of Pennsylvania, as applied to a pending suit, declaring the relation of landlord and tenant to exist, when, upon a certain state of facts, it did not exist before; the legislation, in this instance, growing out of the perplexing existence of one rule for citizens of the State, and another for "Connecticut settlers," who, it seems, had "a law unto themselves," presenting the anomalous condition of a community in one State governed by the laws of another. The case is hardly a precedent for the one at bar, as will be more apparent by reference to *Lambaun v. Hartswick*, 13 S. & R. 133. The legislation complained of and sustained was in defense of the sovereignty of the State against the assumptions of settlers from another, which legislation, at most, only placed all residents within her borders upon an equality before her laws. *Sampeyreac & Stewart v. The United States*, 7 Pet. 222, presented these facts: A decree in the territorial courts of Arkansas against the United States, in favor of a party claiming under a fictitious person, upon forged title papers, and a perjured witness. After the expiration of the time to appeal, congress by law authorized bills of review to be filed in a certain class of cases, within which this was one. The supreme court of the United States held that the law referred to was "in no respect the exercise of judicial powers; it only organizes a tribunal with the power to entertain judicial proceedings;" wherein the law of congress differed from the ordinance under consideration. In 1852 the legislature of Maine enacted a law allowing writs of "review" in cases where "the defendant had obtained his discharge in bankruptcy before or subsequent to the rendition of the judgment, provided the cause of action accrued before the proceedings in bankruptcy, and that the claim or demand was of such a character as would be barred by a discharge in bankruptcy." This statute was repealed the year succeeding its enactment. The granting of

the review was made peremptory on a case conclusively within the statute; and the law applied to all such cases, without regard to the time which had elapsed between the judgment and the petition. Notice of an application for a review was required to be given to the opposite party, and there was a day in court when both parties could be heard on the motion for a review. Aside from this statute there was no appeal in the cases therein provided for. This statute was sustained in *Colby v. Dennis*, 36 Me. 9, upon very doubtful reasoning; and in *Atkinson et al. v. Dunlap*, 50 id. 111, the case of *Colby v. Dennis* was qualified and limited, and clearly questioned. The last-named case was this: Judgment in 1850; petition for review dismissed; in 1859, after expiration of period for review or error, a law was enacted by the legislature allowing a review in cases where the judgment rendered was based upon perjury, to be established, on petition, to the satisfaction of the court, both parties having a right to be heard on the application for review; petition for review under this statute; review refused on the ground that the statute was prospective and not retroactive; if retroactive, the act was unconstitutional. It was said by the court, that "the legislature, undoubtedly, has constitutional jurisdiction over remedies; but, after all existing remedies have been exhausted, and rights have become permanently vested, all further interference is prohibited." It was further declared, that "a judgment of a court becomes final when, by the then existing laws, the time for a review and for reversal for error has expired; it then becomes a vested right, by force of the constitution and the existing laws; and a statute designed to retroact on such a case, by reviving the right of review, is unconstitutional and void." And it was further stated that, "in 1850, judgment had been rendered for the respondent, which became a verity, subject only to a reversal on error within six years after the entering up thereof, or to be reviewed within three years from that time; both of which contingencies had transpired before the subsequent proceedings hereafter to be considered, and consequently that judgment by the then existing laws became permanent and effectual forever. And why should it be otherwise? * * * It had passed the time of reversal for error, and the ordeal of two petitions for review, and the statute of limitations had forever barred its further interruption; or, in other words, by force of the constitution and the existing laws, that judgment had become a vested right, and incapable of annihilation, except by payment and

Lawson v. Jeffries.

satisfaction." * * * If a review of such judgments may be ordered for one cause, it may be equally so for another, or any cause within the discretion of the legislature. Then the salutary maxim of the common law, '*finem litibus imponit*,' would become obsolete, when all cases heretofore settled by the most solemn adjudications known to the law, involving all rights and titles acquired under them, might pass in review before a subsequent tribunal, long after witnesses had deceased or their memories had become impaired." Referring to the petitioners for review, the court say: "Their days in court had terminated, all legal remedies exhausted, and the time had arrived when their opponent, protected by the law, could repose in common with all other citizens whose rights had vested, after much tribulation." Similar views expressed in *Prop'rs Ken. Purchase v. Labore*, 2 Me. 275, are approved in *Atkinson v. Dunlap*, 50 id. 111. In *Burch v. Newbury*, 10 N. Y. 394, of the same character with those last referred to, it is said: "The misfortune of having vested rights, under judgments and decrees of our courts, thus disturbed, is far from being trivial, if we consider, that on this principle, no judgment whatever, in a court of law, can be rested upon as final." The supreme court of the United States, in *The State of Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 18 How. 421, say: "But it is urged that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudications upon the private rights of parties. When they have passed into judgment, the right becomes absolute, and it is the duty of the court to enforce it. The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge." The court then proceeded to show that the rule, thus indorsed as inviolable, is not in that case invaded.

Two considerations are invoked in support of the claim of the plaintiff in error, which demand attention: 1. The supposed enlarged, if not unrestricted, powers of a constitutional convention; 2. The character of the government at the time of the rendition of the judgment in which a new trial is sought.

As to the first: A constitutional convention is convened to build up, not to tear down; to protect, not to destroy. Our American

system is peculiarly one of established, regulated law. If, in our system, there is any one feature pre-eminently prominent, it is a sacred regard for law and private rights. A part of the American system, impressed alike upon the people and the States, is the distribution of powers into legislative, executive and judicial. Although a constitutional convention represents the sovereignty of the people, this sovereignty is subordinate to the constitution of the United States and to the great American doctrines of justice, truth, right and law. Even in their sovereign capacity, the people do not possess the license of the *commune* on the one hand, nor absolute, unrestricted power on the other. Delegates are unrestricted as to the propositions they shall submit to the people; but even ratification does not validate violations of the national constitution, of law, and of rights already established. With the adoption of the federal constitution, arbitrary power, which had theretofore defied the rights of persons and property, was denied an existence, whether in national or State governments, or with the people in their sovereign capacity; and there was ordained a sacred and inviolable separation of legislative, executive and judicial authority. These principles are, with us, fundamental, and cannot be disregarded by a constitutional convention any more than the legislative, executive or judicial departments of a government can exercise the powers of each other. When they do, their acts are void.

In regard to the second. Dealing with the delicate questions growing out of the war, we have deemed it the course of wisdom and justice to follow, as far as we could understand it, the spirit of the solution of these matters furnished by the supreme court of the United States, rather than precedents of some of the States. These appear to have pursued the policy of political passion, or followed theories, correct perhaps in the abstract, to impolitic, if not unwise conclusions. At any rate, whether right or wrong, we have not been disposed to act upon extreme views in adjudicating the rights of parties, but have treated, as valid and binding, without constitutional or legislative approval, the contracts of individuals, the judgments of the courts, and the acts of the legislature during the existence of the Confederacy, in all matters of a business and domestic character, not involving directly hostility to the rightful government. Pursuing the rule by which we have thus far been guided, we are not prepared to hold, as the courts of some of our sister States have done, with reference to similar measures, that,

Lawson v. Jeffries.

because the judgment sought to be annulled for the purpose of a new hearing was rendered by a court acting under the insurrectionary government, affords a sufficient basis to legalize the ordinance hereinbefore quoted.

In view of the subject under review, we remark :

1. If a legislative body may grant a new trial, it may order a continuance, annul a judgment, suspend a trial, direct the judgment to be entered, and otherwise interfere with the discretion and independence of the judiciary. The evils that would flow from such an assertion of legislative power are too apparent to be enumerated, and need not be here undertaken.

2. Placing the solution of the case at bar upon the sole ground of a usurpation of judicial attributes by the convention, we waive, as unnecessary, a discussion of the vexed questions of vested rights, the obligation of contracts, retrospective legislation, due process of law, property in judgments, remedial laws, with incidental and kindred matters propounded and discussed in nearly every case involving any one of this family of questions, and by which cases we are sustained in the result herein arrived at.

3. The right of the restored governments to annul, reopen or evade the judgments of the Confederate courts — whether, if those judgments were void, they could be made valid by the approval of the restored governments — and the wisdom of interfering with those judgments, if the right to do so were conceded, are questions which are discussed and variously acted upon in, at least, the States of Arkansas, Mississippi, Alabama, Georgia and Florida, and in what manner, and with what result, we have before shown. The only basis of a right to annul, as in Florida and Arkansas, to grant new trials in the discretion of the reorganized courts, as in Alabama, was upon the character of the governments under which those judgments were rendered, the illegality of the right thus to interfere being conceded, except for this cause; otherwise admittedly indefensible. In Georgia, this fatal obstacle was obviated, as we have seen, to the satisfaction of the courts of that State at least; whether rightfully, is not for us to determine. Suffice it, that the action of the Mississippi convention was unlike that of the States whose measures were sustained.

Without further discussion, we append the authorities coming under our observation in the examination of this case. Adjudications bearing more directly upon the power of a legislative body to

perform judicial acts. 15 Penn. St. 18; 10 N. Y. 396; 1 N. H. 199; 2 Chip. (Vt.) 77; 7 Humph. 152; 9 Gill & J. 365; 39 Penn. St. 146; 43 id. 512; 3 R. I. 299; 4 id. 324; 2 Allen, 361; 11 Penn. St. 490; 37 Ga. 158; 40 id. 493; 3 N. Y. 511; 3 Me. 335; 4 Ind. 301; 3 Scam. 238; id. 469; 5 Gilm. 417; 26 Cal. 135; 36 Me. 9; 50 id. 111; 5 Pick. 65; 6 Seld. —; 3 Mich. 436; 21 id. 390; 10 Md. 478; 18 id. 193; 8 Blackf. 10; 24 Ark. 91; 33 Cal. 279; 16 id. 11; 17 id. 547; 10 Yerg. 59; 5 Humph. 165; 41 Ala. 153; Dan. Ch. (Vt.) 237; 10 How. 395; 7 Pet. 222; 11 How. 185; 2 Pet. 380; 8 id. 110; 35 Ga. 26; 38 id. 285; Phil. (N. C.) 149, 209; 15 S. C. (Rich.) 84; 21 Ia. Ann. 325; 44 Mo. 570; 7 Cald. 15; 32 Tex. 1; 43 Ala. 173, 224. Whether a judgment is property and a vested right. 2 Wm. Black. 396, 436, 464; 2 Kent (11th ed.), 432, 487; 50 Me. 111; 12 N. Y. 209; 4 Dev. 15; 16 Penn. St. 266; 17 B. Monr. 176; 1 Mich. 56; 10 Cal. 305; 4 Barb. 64; 12 Coke, 1; 1 Atk. 182; 1 P. Wms. 267; 6 How. (U. S.) 301; Potter's Dwarries, 479; Cooley's Lim. 33, 94, 355, 361, 569. Vested rights and the obligations of contracts. 12 N. Y. 209; 4 Dev. 15; 4 Barb. 64; 10 id. 223; 3 Mich. 436; 9 Gill. 302; 2 id. 79; 6 Wend. 526; 7 Cal. 1; 16 id. 11; 15 id. 515; 10 id. 305; 9 id. 81; 2 id. 524; 40 Ala. 547; Phil. (N. C.) 200; 7 Cald. Due process of law. 13 N. Y. 378; 11 Mich. 113; 3 N. Y. 511; 43 Ala. 224. Retrospective legislation (particularly as to granting the right of appeal where none existed, or where the time limited by existing laws has expired). 7 Johns. 477; 11 Mass. 396; 45 Me. 507; 2 Greenl. 275; 17 B. Monr. 176; 12 Wheat. 349; 3 id. 28; 11 id. 420; 8 Mass. 423; 13 Pick. 532; 7 Ind. 470; 7 Blackf. 154, 623; 8 id. 56, 58, 116, 160, 177, 455; 1 Ind. 24; 2 id. 65; 5 id. 348; 8 id. 533; 26 Cal. 46; 3 Vt. 502; 2 Aik. 284; 15 Ohio St. 207; 13 Wis. 37; 19 id. 17; 1 Dan. Ch. Pr. 77; 1 Aik. 314; 5 Tex. 433; Dav. Ind. Dig. 215, § 89; Phil. (N. C.) 410; 41 Mo. 63; 40 Ala. 547; 41 id. 153. Judicial acts: 24 Ark. 91; 1 N. H. 199; 10 N. Y. 396; 41 Ala. 153; 43 id. 173; id. 224. Remedies. 1 E. D. Smith, 681, 739; 3 Mich. 436; 2 Gill, 79; 4 Cal. 127; 9 Wis. 559; 13 id. 37; 19 id. 17; 7 Tex. 348; 5 id. 433; 4 Wheat. 122; 12 id. 349; 7 Humph. 130; 2 Ala. 397; 1 Comst. 536; 1 McLean, 135; 8 W. & S. 49; 3 Den. 247; Davis' Ind. Dig. 214, § 73; 30 Ala. 547; Story's Conflict of Laws, title, Remedies. Power of a legislature to divest vested rights. 4 Greene (Iowa), 168; 2 id. 94, 181; 6 Col. 650; 5 Tex. 442; 16 Ohio, 509; 17 id. 125; 1 Aik. 264; 10 Yerg. 505; 1 Sneed, 83; 2 Swan,

Lawson v. Jeffries.

273, 405; 7 Humph. 130. Whether a right has vested is a question for judicial determination. 7 Ind. 332; 1 Blackf. 220; 10 Barb. 223. A constitutional convention has no more power than a legislature (9 Yerg. 495), and is limited to preliminary, temporary and provisional legislation; as to which, see, generally, the authorities above cited, and the almost uniform practice of constitutional conventions before and since the late war. *Vide*, also, 1 Mich. 295; 34 Miss. 227; 38 id. —; 40 id. 29; 41 id. 119; 4 Wall. 277; 7 G. & J. 206; 39 Ga. 493; 18 How. 421; 2 Gall. 139; 2 How. 612; 15 Wis. 28; 8 Wheat. 17; 1 How. 311; 3 id. 707; 56 Penn. St. 48; 2 Vt. 179, 517; 15 La. Ann. 153; 15 How. 304; 10 id. 395; 11 id. 185; 7 Pet. 222; 8 id. 110; 43 Ala. 435; Sedgw. on Stat. & Const. Law; Walker's Am. Law; Pomeroy's Const. Law; Potter's Dwaris; Cooley's Const. Lim.; Story on the Constitution.

It is believed that the ordinance under review is without a precedent, and without the support of an accredited authority in the United States. No day is given the opposite party in court to contest the motion for a new trial. In fact no motion is required. Upon filing an affidavit of merits, and the absence of counsel at the rendition of the judgment or decree, a new trial is awarded, not by the court but by force of the ordinance. Hence, we say it was a judicial act, and, therefore, unauthorized. *Texas v. White*, 7 Wall. 700; Act of Cong., approved March 2, 1867, and the several acts supplementary thereto; Cooley's Const. Lim. 95, 355, 369, 413, 569; Potter's Dwaris, 430; 12 N. Y. 209; 4 Hill, 147; 13 N. Y. 395; Hob. 85; 8 Coke, 118; 12 Mod. 669; 2 Chip. 77; 39 Penn. St. 146; 1 N. H. 204; 16 Penn. St. 266; 7 Humph. 152; 3 Johns. 299; *Regents v. Williams*, 9 G. & J. 365; 43 Penn. St. 512; 10 N. Y. 396; 2 Allen, 361; 37 G. A. 158; 11 Penn. St. 490, 39 id. 137; 3 N. Y. 511; 12 id. 209; 4 R. I. 324; 7 G. & J. 206; 3 Me. 326; 39 Ga. 493; 15 Penn. St. 18; 7 Johns. 477; 4 Ind. 301.

The decree appealed from, denying a new trial or rehearing in the case at bar, is affirmed.

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY V. HARRISON.

(48 Miss. 112.)

Master and servant — railroad — liability of company to one volunteering service.

The conductor of a train ordered a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars. The boy refused, but on being threatened by the conductor, uncoupled the cars, and in doing so was injured. *Held*, that the railroad company was not liable.*

ACTION to recover damages. The opinion states the facts.

J. A. P. Campbell and Nugent & Yerger, for plaintiff in error.

Geo. Harvey and R. C. Smith, for defendant in error.

TARBELL, J. This suit was instituted by Harrison to recover damages from the railroad company for personal injuries caused by the negligence of the company's servants in running a train of cars. There was a verdict of \$600 for the plaintiff in the action. A motion for a new trial was overruled, and thereupon a writ of error by the railroad company. Exceptions were taken to the instructions given for the plaintiff in the action ; to the refusal to give instructions asked on behalf of the company ; to the modification of those given, and to the refusal to grant a new trial. The case made by Harrison, who was a witness in his own behalf, was this : That he was standing at the crossing in Canton, waiting for the train to pass ; the conductor or engineer, Mr. Pendergrast, ordered him to go and uncouple the train ; he refused at first ; then the conductor said to him, "G—d d—n you, go in and uncouple the train, or I will hit you with a billet of wood ; he was in fear of some bodily harm from Mr. Pendergrast and was forced to go in and uncouple the cars ; after he had uncoupled the cars the train commenced moving ; he was standing with his back to the tender and his face to the flat cars ; the tender came against his shoulder and knocked him under the cars ; the tender wheels

* See to the same effect *Flower v. The Penn. R. R. Co.*, 8 Am. Rep. 251.—REP

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

ran over his left leg ; it was done in 1867 ; he was then fifteen years old ; after he fell off and was hurt, Pendergrast said, " Move him off the track, G—d d—n him, he had no business there ; " there was no brakeman on the train when he was injured ; he would not have gone in unless he had been ordered and on account of the threat ; the engineer did not make any signal or blow his whistle after he uncoupled the cars ; he suffered much pain and mental suffering by the loss of his leg ; he could have gotten away from Mr. Pendergrast if he had seen proper to do so ; he was not bound to obey the orders of Mr. Pendergast, if he had not seen proper to do so ; the train was not stopped good when he went in ; he did not know he could uncouple the train when he went in, but thought he would try ; the train was backing ; there was nothing on the flat cars that he was cutting loose. And this was all the testimony of Harrison.

There was other evidence on the part of plaintiff, but whether the language of Pendergrast was applied to Harrison was not certain. The value of medical attendance and attorney's fees in the prosecution of this suit were also given in evidence. On the part of the company, Pendergrast testified, that he was the engineer and in charge of the train when the accident to Harrison occurred ; he says there were four brakemen on the train ; that he was coming over the flat cars to uncouple the cars, and not coming fast enough, witness called to him to hurry up ; he was wanting to switch off to get out of the way of another train ; he did not know that this boy uncoupled the train, and did not know he was in the way until after he was hurt ; the tender was loaded with wood, which was piled high and obscured his vision ; he did not order Harrison to uncouple the cars ; he did not threaten him ; the accident occurred one hundred yards above the street crossing ; he had pulled up at the crossing and then passed on ; it was sixty-nine yards or steps from the switch to the place of the accident ; there was lumber on all the flat cars ; the business of witness was to take charge of engines as they arrived in Canton ; had a right to hire wipers of machinery and watchmen, but no authority to employ any one outside of that ; he had no authority to employ brakemen ; it was strictly against orders to order a bystander to uncouple cars ; he had no authority even to order a fireman to uncouple cars ; there was no danger of a collision.

Another witness testified that he saw Harrison jump on the train

at the freight depot and ride off on the flat car; that boys were in the habit of doing so, and that it was impossible to prevent it.

Other witnesses also testified to the presence of Harrison on the cars and train, from whence he stooped to uncouple the cars and fell. Several sets of instructions for the plaintiff in the action, differing in material respects, are given in the record, and it is difficult to determine those submitted to the jury, nor in our view of this case is it essential.

The theory of the prosecution is, that Harrison, standing on the crossing, when the train in charge of Pendergrast hauled up, was ordered, in the absence of brakemen on the train, under threats of violence, to go in and uncouple the cars; that intimidated by these threats, and through fear of bodily harm, he obeyed such orders; and while in the act of uncoupling, Pendergrast so carelessly conducted the train as to seriously injure the boy, wherefore this suit was instituted.

On the other hand, the defense presented this view: That the boy was already surreptitiously on the train, without the knowledge of Pendergrast, in charge; that the orders of the latter were to the brakemen, of whom there were four on the train; that the boy, either in obedience to supposed orders, or of his own volition to display his dexterity, or from some other voluntary motion, stooped down to perform the duty of brakeman, when he fell under the cars and was thus injured, without the knowledge, neglect, or carelessness of the conductor, and by his own fault.

The claim of bodily fear is, on the facts, entirely untenable. The boy was fifteen years of age; he was on the ground, according to his own theory, some distance from the train, and free to fly further; the conductor was upon the train acting in the double capacity of conductor and engineer; to hit the boy, a desertion of the train was necessary; according to the evidence in support of the action, there were on the train no brakemen; and there was haste to switch off to get out of the way of another train. Under these circumstances, or any circumstances, to suppose the engineer would leave his train to pursue a boy up the street is simply absurd.

The only cases referred to in support of this point, are *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400, and *Lovell v. Salem, etc., R. R. Co.*, 9 Allen, 557, where boys surreptitiously obtained seats in the cars for a free ride, and were ejected in so careless a manner as to injure them. The boys being thus on the cars, in the presence and

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

under the power of the conductors, bodily fear was fairly involved. It was held in those cases, that in ejecting the boys from these cars and trains, the conductors were in the line of their duty, and, hence, even bound to act with care and prudence. The dissimilarity is so apparent, comment is not required. The pretense of fear in the case at bar is without reason and without precedent.

Upon the main question, the adjudications, from consideration of public policy, have gone far in holding common carriers to the fullest responsibility for the acts of their agents toward their passengers under their care. But the case at bar presents a totally different question. Here, accepting the view of the plaintiff in the action, the conductor steps aside from the line of his duty, and in violation of positive instructions, not only orders a stranger from the street to uncouple his train, but accompanies the order with profanity and threats of personal violence in case of refusal. Here is a most gross and wanton interference with the rights of a citizen—one not under his care or control, and no way connected with the company or its concerns; an unauthorized, illegal assault upon a stranger not upon the train, nor meddling with it, but standing at one side and upon the street.

If we accept the theory of the defense, the conductor was ignorant of the presence of the boy on or about the train, and upon the facts the company would not be responsible for the injury he received.

Upon the case made by himself, is the company bound to respond to the claim of Harrison? In view of the rules very positively stated in *McCoy v. McKowen*, 26 Miss. 487, we answer, clearly not. In the well-considered and leading case of *McManus v. Preckett*, 1 East, 106, Lord KENYON held, "that when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act." Judge STORY (Agency, § 456) lays down the same rule, though in somewhat different language; and, in *McCoy v. McKowen*, referring to the views of Lord KENYON and of Judge STORY, it is said: "It is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned by

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

nim." There is no pretense in the case at bar, that the railroad company sanctioned, or has adopted or ratified, the act of the conductor.

The cases cited in support of the action may be briefly referred to with advantage: In *Kline v. The Cent. Pacific R. R. Co.*, 37 Cal. 400, a minor, sixteen years of age, jumped upon a train of cars for the purpose of a free ride. The conductor ejected the boy, but in so careless a manner as to cause him to be injured. It was held by the court, that the conductor could rightfully have prevented the boy from getting upon the cars, and if, in so doing, an injury had befallen the latter, no liability would have attached to the company. But, that after the lad had gained a position on the cars, though the conductor might rightfully put him off, yet he must do so in a careful and prudent manner. The removal of persons from the cars who get thereon wrongfully, was in that case declared to be within the scope of the general authority of the conductor, and that, in ejecting them, he was in the line of his duty. *Lovett v. Salem, etc., R. R. Co.*, 9 Allen, 557, was similar to that of 37 Cal. *Weed v. Panama R. R. Co.*, 5 Duer, 193, presented only the question of the liability of a railroad company to a passenger for the willful acts of a conductor.

Tilley v. The H. R. R. Co., 29 N. Y. 283, involved only questions as to the proper subjects to be considered in estimating damages. Death in that case occurred to a passenger by a collision of trains.

Kerwhacker v. The Cleveland, etc., R. R. Co., 3 Ohio St. 172, was between the railroad company and owners of stock killed while wandering on the track.

Brown v. N. Y. C. R. R., 32 N. Y. 597, was an action to recover for injuries sustained by plaintiff by a collision of defendant's cars with a stage coach, in which plaintiff was a passenger. The accident occurred while the stage was crossing the railroad track where there was a "running switch." Held, the making of such a switch over the crossing of the track by a public road, in the populous part of a village, is of itself an act of gross and criminal negligence, and any person who, without negligence on his part, is injured at such crossing, by the act of the running switch, may recover the damages sustained, without other proof of negligence than the act of making such switch.

Southwick v. Estes, 7 Cush. 385, was an action on the case for

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

injury to land. The agents of defendant were engaged in removing stones from the bed of a river to the land of plaintiff, in doing which they sometimes crossed the line of defendant's land, from which they removed stones and soil, though contrary to the directions of defendant. The *nisi prius* judge instructed the jury, "that if the servants of the defendant had done such acts while in his service, and the acts done were within the general course of business and scope of employment in which they were employed by him, and although directed to remove stones or earth within the defendant's southern boundary line, yet, if they were thus employed, negligently passed over the limits thus pointed out by the master, being at the time employed to remove stones and transport them to the north bank of the stream, and had thus removed stones from the plaintiff's bank, and carried them to the defendant's bank on the opposite side of the river, and there deposited them for a wall or embankment, the master was liable for this action; but that if the acts of the servants were not done negligently, but willfully, and with the intention of disregarding the directions of the master, he would not be responsible therefor." The jury returned a verdict for the plaintiff, and thence the case was taken before the appellate court, where SHAW, C. J., said: "The distinction between the liability of the master for the negligent acts of his servants, and that resulting from their willful and designed tortious acts, appears to have been carefully made and correctly stated in the charge of the judge." 1 East, 106 was cited with approval.

Philadelphia, etc., R. R. Co. v. Derby, 14 How. (U. S.) 468, was a case between a railroad company and a passenger injured by a collision of trains running contrary to orders. The company was held liable.

Norris v. Litchfield, 35 N. H. 271, was an action against the town to recover damages to the plaintiff's horse, carriage and harness, by the insufficiency of a bridge for want of sufficient width and suitable railing. On approaching the bridge on a very dark night, plaintiff heard a carriage approaching from the other direction. He called out to the person approaching to stop, and turned out, as he supposed, so far as was safe and prudent. There was no railing on the east side of the bridge, over which plaintiff's horse backed and was killed, in consequence of a collision with the approaching carriage. The town authorities, who were defendants, asked the court to instruct the jury, that if they believed the

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

plaintiff did not turn to the right and give the approaching carriage one-half the road, and there was abundant room for him to do so, and that the accident happened in consequence thereof, then the plaintiff cannot recover.

The defendants further requested the court to charge the jury that if they believed that if the plaintiff had given to the approaching team due legal right no accident would have happened, then the defendants would not be liable.

The court declined so to charge, but charged, "that where some accident occurs which ordinary care and prudence could not prevent, and a defect exists in the highway by means of which the damage occurs, and without which it would not have occurred, the town is liable; that, if the plaintiff's carriage was in the middle of the traveled part of the road, his agent using ordinary care, skill and prudence, considering the circumstances, and came in collision with another carriage, this would be an accident for which the agent of the plaintiff would not be in fault, so far as this case is concerned; and if such accident led to this damage by a defect in the highway, the town is liable."

The jury returned a verdict for the plaintiff, and this result was sustained in the supreme court, on the grounds, viz.: That the plaintiff, at the time of the accident, was exercising all the care and prudence, under the circumstances, of which he was capable; that though the plaintiff might not have given one-half the road, as required by law, and was thus, himself, a trespasser; yet, that, but for the defects in the bridge, the accident to the plaintiff would not have occurred, and hence the verdict was upheld.

It is urged by the counsel for Harrison that, after the latter had gone in to uncouple the cars, the conductor knowing he was there on that service, it then devolved on the agent of the company to observe all the care and prudence which the law exacts in such cases. The rule invoked is a sound one, but its application to the facts of this case may well be questioned. Is not the case at bar as though the conductor had caught the boy with one hand and thus held him under the engine, while with the other he so managed the machinery as to purposely run over the lad and cut off his foot, doing this willfully and maliciously to one not a passenger but a stranger? If the boy went in through fear, it was equivalent to force; and thus did not the command, the threat, the obedience, the service and the injury constitute one act? Is the company

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

liable in such a case? Suppose the boy had attempted to cross the street between the moving cars and had been thus injured, what would have been the right of the parties in that case? In reason and according to the precedents, the company, in such case, would not be liable. *Gahagan v. Boston, etc., R. R. Co.*, 1 Allen, 187; 2 Redf. L. of Railw. 198, note. Where one attempted to pass between cars in motion, propelled by an engine, without any necessity, it was held to be such unequivocal evidence of negligence that the court were justified in charging the jury, as matter of law, that the party could not recover. *Id.*

In the case at bar, the train was backing into a switch, and Harrison, in his testimony, says it was moving when he went in to uncouple the flat cars from the engine. Accepting his theory of the case, it seems impossible to separate his presence between the cars in the act of uncoupling them, from the threats to which he says he yielded through fear. Upon this hypothesis, the injury was the result of a gross, willful, malicious trespass upon a stranger to the company, and not a passenger; an act in violation of orders; outside the scope of the engineer's duty and authority; a transaction for which, within the adjudications from the ruling of Lord KENYON, in *McManus v. Crickett*, 1 East, 67, to the present time, the company is not responsible. See Smith's Master & Servant, 130 (ed. of 1852), top page, title, "In cases of tort—*civilliter*."

But suppose the service of Harrison to have been entirely voluntary on his part. He undertook what, under the most favorable circumstances, is a most dangerous duty, for which servants are specially hired on account of its risk, as few men are willing to be thus employed. In this case the cars were in motion and the engineer known to be in haste. In the estimation of the public generally Harrison might as well have put his hands in the jaws of a lion, expecting to withdraw them unscratched; descended within the mouth of a volcano, believing he could return in safety; or have entered a magazine with a lighted match without danger, as to have gone, as he says he did, a youth wholly unused to that duty, between the cars of a moving train for the purpose of uncoupling them. Only the most experienced, or those contracting for that special service, would be willing to, or could, with any degree of safety, make an attempt involving so much danger—an attempt universally considered hazardous, if not desperate, and declared by the courts to be "extra hazardous." With these two propositions,

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

in view of a compliance on the part of Harrison through fear, and of a voluntary service, a few authorities will be referred to as conclusive of the case.

In 37 Cal. and 9 Allen, *supra*, the actions were sustained upon the ground that the conductors, in ejecting from the cars boys who had obtained seats for the purpose of a free ride, were acting in the line of their duty, but performing such duty carelessly, the boys were injured, and the companies were liable. It was further held, that if the conductors had resisted the boys in their efforts to get upon the trains and they had been thus injured, the companies would not have been liable. It was said, that the boys having gained seats, they had acquired somewhat the character of passengers; at least, they could be ejected only in a careful and prudent manner.

Lalor v. C. B. & Q. R. R. Co., 52 Ill. 401, was an action under a statute of that State by the widow and administratrix of her deceased husband, who was killed while employed about the depot of the railroad company as a common laborer. While so employed the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business and affairs of the company about the depot, to couple and connect a freight car with the other cars attached to a locomotive, contrary to the special engagement of the deceased, and to do which he was unversed and inexperienced, and while so engaged having to go between the cars for the purpose, the engine was so carelessly managed as to bring the cars together with great force, by means of which he was crushed to death. It was held, that the company was constructively present in the person of the superintendent, whose commands the deceased was bound to obey, and that thus, by the direct command of the company, the deceased was exposed to the peril by which he lost his life. The court says: "We place this case on the ground of misconduct of the company in exposing deceased to this peril, and when so exposed, in so carelessly mis-managing the engine as to cause his death." In the case at bar, the engineer was charged only with the transfer and making up of trains, and not with general powers, so that he in no sense represented the company, while Harrison was a stranger. It was held in *Brand v. The Schenectady, etc., Railroad Company*, 8 Barb. 368, that a railway is not bound in the same degree of care in regard to mere strangers, who may voluntarily, but unlawfully, go upon

New Orleans, Jackson and Great Northern Railroad Co. v. Harrison.

their track, which they owe to passengers conveyed by them. And this distinction is recognized as sound in 2 Redf. Laws of Railways, 196. Although not referred to in terms, this distinction is uniformly acted upon, practically, in all the cases between railway companies and their passengers, and between the former and strangers; the modern rule of enforcing the obligation of care and prudence and skill with rigor, in the one case governing, while in the other the liability for injuries to foot passengers, occasioned by a collision with engines or cars, is the same as that which arises in respect to a collision between two carriages meeting on the highway, or a collision between a foot passenger and a carriage. 8 Barb. 380. And this renders the case at bar easy of solution. In the last cases put, both have rights and duties and obligations of equal grade; "while engaged in their lawful business, both are bound to use a degree of caution suited to the exigencies of the case; the one to avoid occasioning an injury, and the other to avoid receiving it." Toward passengers, the liability of the carrier "spring from a contract, express or implied, and upheld by an adequate consideration;" and hence, it is said, "a passenger on board a stage coach or a railroad car, and a person walking on foot in the street, do not stand in the same relation to the carrier." 8 Barb. 378. From this it will be more clearly seen that the case at bar falls within the class of cases whereof *McManus v. Crickett* and *McCoy v. McKowen* are embodiments of the doctrines referred to.

The liability or non-liability of the master for the acts of the servant has been expressed in a great variety of forms. PATTERSON, J., in *Lyons v. Martin*, 8 Ad. & Ell. 512, says: "A master is liable where his servant causes injury by doing a lawful act negligently, but not where he willfully does an illegal one."

Suppose, in the case at bar, that Pendergrast, the engineer, instead of driving a steam-engine, had been driving a carriage, drawn by horses, and, having some difficulty about the carriage, had, with pistol in hand, without stopping his team, ordered the boy Harrison between the wheels of his carriage to adjust some of the gearing, and, while the boy was thus between the wheels, suppose he had whipped up his horses, whereby injuries had resulted to Harrison, for which he instituted a suit, what ought to be the result? While the defendant's servant was driving a wagon, the son of the plaintiff, a minor, asked permission to ride. The servant said he might when he got up the hill; and the boy, having

caught hold of the wagon between the fore and hind wheels, the man started the horses into a trot, and the boy was thrown down and badly injured. *Held*, that the master was not liable. *Wright v. Wilcox*, 19 Wend. 343; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; *Shear. and Redf.* 72. And thus an answer is furnished to the question just now propounded.

In those sections where railroads are common through towns and cities, actions for injuries to persons at the street crossings are frequent. It is uniformly held that mutual duties devolve upon the railway companies and upon the foot passengers. To rush across a street in front of a moving engine, or between trains, is regarded as an act of great rashness and folly. An attempt of one, wholly inexperienced and unversed in that work, to uncouple the cars of a moving train, where the service is in fact, as it has been judicially declared, extra-hazardous, can be considered only as still more rash and dangerous than to cross a street in front of a moving engine. It has been repeatedly held to be the duty of a foot passenger, about to cross a railroad track, to look up and down the road, to listen for the cars, and to observe all other usual modes of caution, otherwise the company would be relieved from responsibility in case of accident. In view of these and other adjudications herein referred to, it seems to us very clear that the plaintiff in this action is not entitled to recover, even upon the case which he has made for himself. *Shear. & Redf.*, ch. 5; id. 296, § 266; id. 548, § 488 and notes; id., § 489, etc.

We rest the decision of this case upon several grounds: If Harrison's theory of the facts be correct, then it was a willful, malicious trespass by the engineer, outside of and beyond the scope of his authority, and of his line of duty, not upon a passenger on the train, but a stranger to the company, and, therefore, the latter is not liable.

If uncoupling the cars was voluntary by Harrison, it was an act of most extraordinary rashness and folly, and one which contributed directly to the injury. It is not the degree of his carelessness, however, which exonerates the company, but the question to be determined is, whether his negligence contributed to the injury of which he complains. It is enough to defeat him if the injury might have been avoided by his exercise of ordinary care. And this rule is based upon grounds of public policy, which require, in the interests of the whole community, that every one shall take

Moore v. State.

such care of himself as can reasonably be expected of him. *Brand v. Schenectady, etc., R. R. Co.*, 8 Barb. 368; *Hascomb v. Buffalo, etc., R. R. Co.*, 27 id. 227; *Mackley v. N. Y. Central R. R. Co.*, id. 534; *Shear. & Redf.* 33, *et seq.*; *Owens v. Hudson R. R. Co.*, 2 Bosw. 374; *Chicago & N. W. Ry. Co. v. Sweeney, admx.*, 52 Ill. 326, etc.

In *Hartfield v. Roper*, 21 Wend. 619, the late Mr. Justice COWEN said: When an infant "complains of wrong to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong. *Volenti non fit injuria.*" And in *Brown v. Maxwell*, 6 Hill, 592, it is broadly declared, that "a plaintiff suing for negligence must himself be without fault." This is doubtless correct, as a general rule, but it is not necessary to indorse its sweeping terms as applicable to all cases of a plaintiff suing for negligence, nor even to the case at bar, for in this instance the reckless disregard of prudence by the plaintiff in the action far surpasses any and all the precedents which have fallen under our observation. 2 Redf. L. of Railw. 191, ch. 24, § 2; *Shear. & Redf.*, ch. 3; id., ch. 5, and cases in notes.

Judgment reversed and cause remanded.

MOORE V. STATE.

(48 Miss. 147.)

Constitutional law — impairing the obligation of a contract — Contracts for lotteries — Police power.

A statute incorporated a company to carry on the lottery business in the State for twenty-five years, the company paying the State a certain sum for the privilege. The amended constitution of the State, afterward adopted, prohibited lotteries. *Held*, that this was not impairing the obligations of a contract within the provision of the constitution of the United States.*

INDICTMENT for selling a lottery ticket. The opinion states the case.

* See, also, *Mississippi Society v. Musgrove*, 7 Am. Rep. 723.

Johnston & Johnston, and Miller & Birchett, for plaintiff in error.

J. S. Morris, attorney-general, for defendant in error.

PEYTON, C. J. At the September term, 1872, of the circuit court of Yalobusha county, Henry H. Moore was indicted for selling, on the 16th day of September, 1872, a lottery ticket, to be drawn in a lottery and gift enterprise within this State.

To this indictment the defendant pleaded, that in issuing the ticket mentioned and specified in the indictment, he was acting as the agent of the Mississippi Agricultural, Educational and Manufacturing Aid Society, a body politic and corporate, which was duly incorporated by an act of the legislature of the State of Mississippi, approved February 16, 1867, and that prior to the adoption of the present constitution of said State, the said Mississippi Agricultural, Educational and Manufacturing Aid Society fully complied with all the provisions of said act of incorporation.

To this plea the district attorney demurred, on the ground that it shows no valid bar to the prosecution. The demurrer was sustained by the court, and leave granted to the defendant to plead over; and upon the plea of not guilty, the case was submitted to a jury, who found the defendant guilty, as charged in the indictment; whereupon the court sentenced the defendant to pay a fine of \$250, and to be imprisoned in the county jail of said county for the space of seven days, and that he pay the costs of prosecution, and stand committed till the fine and costs are paid.

From this judgment the defendant prosecutes this writ of error, and assigns for error the action of the court in sustaining the demurrer to the defendant's special plea in bar.

The 15th section of the 12th article of the present constitution of this State provides that the legislature shall never authorize a lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold; and the act of the legislature, approved July 9th, 1870, makes it the imperative duty of the attorney-general to enforce this provision of the constitution.

It is insisted, on the part of the plaintiff in error, that the act of incorporation, under the authority of which he acted in the sale of the lottery ticket, was a contract between the corporators and the

Moore v. State.

State, which was protected by that clause of the 10th section of the 1st article of the constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

On the part of the State, it is contended that the said act of incorporation conferred a privilege upon the corporators to draw lotteries and to deal in lottery tickets, which was not shielded by the above-mentioned clause in the constitution of the United States against the future legislation of the State, and that said act was abrogated by the 15th section of the 12th article of our present constitution, which prohibits any lottery heretofore authorized to be drawn, or tickets therein to be sold; and the act of 1870, above mentioned, prescribes the penalty for violating this provision of our constitution.

It will thus be seen that the grave and important question presented by this case for our solution is: Is the act of 1867, relied upon by the plaintiff, so protected by the above-stated clause in the constitution of the United States, as to remain unaffected by the said 15th section of the 12th article of the existing constitution of this State?

There can be no doubt that a private corporation to whom a franchise has been given for a legitimate purpose, such as banks, insurance, manufacturing and railroad companies, is a contract which would be protected by the clause above referred to, of the federal constitution, from legislative interference, unless the legislature reserved to themselves, in the charter of such corporation, the right to repeal, modify or change it.

After an exhaustive research into the authorities upon this subject, we have been unable to find a case where a charter has been granted to deal in lotteries for a series of years that has been dignified with the name of contract, and protected by the federal constitution from the future legislation of the State.

Lotteries have sometimes been allowed as a speedy means of raising money for some laudable purpose, such as to build a church or a school-house; they may thus be used as a collateral means to effect good and charitable ends; but never to be carried on solely for the pecuniary profits arising from the business, in utter disregard of the public weal.

Morality, religion and education are the three main pillars of the State, and the substance of all private good. They should, there-

fore, be objects of primary regard by the laws; and any legislation that would have a tendency to banish either of these from the community ought not to be favored.

Suppose the legislature of 1867, instead of the privilege of selling lottery tickets throughout the State, and of drawing lotteries in the city of Vicksburg, had granted to said corporation, for a bonus of \$5,000, the privilege of keeping a common gaming-house in the city of Jackson, in this State, for the period of twenty-five years; can it, with any shadow of reason, be contended that the bonus can give to such pernicious privilege the sanctity of a contract which would be shielded by the constitution of the United States against any subsequent legislation of the State? And yet there is very little difference in their demoralizing tendencies. The privilege to do wrong cannot, it is believed, be thus purchased and fastened, like the shirt of Nessus, upon the community, without any power of getting rid of it for a quarter of a century. Such a doctrine would deprive the State of the power to right herself by repealing any reckless legislation whose certain tendency is to corrupt the fountain of public morals.

Justice GRIER, in delivering the opinion of the supreme court of the United States, in the case of *Phalen v. Virginia*, 8 How. 168, says: "The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling, it reaches every class, it preys upon the hard earnings of the poor, and plunders the ignorant and the simple."

If this be a correct view of the effects of lotteries, they can hardly lay claim to the protection of the federal constitution against legislative interference on the part of the State in the matter of such vital importance to the welfare of the State.

No extraordinary latitude should be given to the use of this provision in the constitution of the United States. No general power is given to the federal government over the affairs of the States. Chief Justice MARSHALL has said: "The framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the

instrument they have given to us is not to be so construed." *Dartmouth College v. Woodward*, 4 Wheat. 518, 529.

The owner of a lot in a city intends to build a wood-house; the constituted authorities say you must not exercise that right; it is dangerous to all; you may build of brick or stone, because the safety of all is in this way promoted. Can the owner with impunity violate such a law, because he has the absolute right of property?

The policy of the State has always been opposed to lotteries which, from 1822 to 1867, have been prohibited by law and punished as a species of gaming; and it is believed to be one of the highest duties of the legislature to watch over the morals as well as the health and education of the people, and that whenever the preservation and inculcation of sound morals may require it, we think the legislature has the power to abolish a lottery license or privilege, as a part of the police power of the State to regulate her own domestic concerns, and the exercise of that power does not violate that provision of the constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts. *Phelan's Case*, 1 Rob. (Va.) 725, and *Hirn v. The State of Ohio*, 1 Ohio St. 16. The question of lottery is regarded by a distinguished author as one of mere police. Wharton on Conflict of Laws, § 490.

Gaming itself, not being a common-law offense, the mere single act of gaming in one's house would be no offense at common law; but the keeping of a common gaming house would be indictable at the common law, for the reason that persons, especially young persons, are attracted there, and lured to vice; neither is the single act of drawing a lottery for some lawful purpose objectionable, but the evil results from its repetition and continuance as a regular business for a series of years.

Notwithstanding the imposing title of the act of incorporation in the case under consideration, it is not difficult to perceive that the main object of the act was to secure the privilege of doing a lottery business for the period of a quarter of a century, regardless of its demoralizing effects upon the community, and in violation of the long cherished public policy of the State.

It is insisted by counsel for the plaintiff in error, that the validity of the charter cannot be tested in this collateral way. It must be done by a direct proceeding against the corporation by *quo warranto*, or an information in the nature of a *quo warranto*. This would be true, if it were a proceeding for a forfeiture of the

charter; but this is not the case. The only question is, was the charter abrogated by the present constitution of the State?

Mr. Parsons, in his valuable work on Contracts, puts the question: "Can a legislature, having authorized an individual or a company to raise a certain sum of money by lotteries, or after having licensed individuals to sell spirituous liquors for a certain period, afterward for the purpose preserving the public morals, recall such authority or license by a general law prohibiting lotteries or the sale of spirituous liquors? And if this can be done where the grant or license was gratuitous, can it also be done if a certain price or premium was paid for it?" He then proceeds to say: "While the authorities are not uniform, we consider the prevailing adjudication in this country to favor the rule, that such general laws are not, in either case, within the purview of prohibition of the constitution." 3 Pars. on Cont. 556.

Concurring with Mr. Parsons in this view of the law, we affirm the judgment of the court below.

SIMBALL, J., also delivered an opinion.

HOLMES, appellant, v. EVANS.

(48 Miss. 247.)

Statute of frauds — contract for sale of land — memorandum.

BILL for the specific performance of a contract, of which the following was the only written evidence: "Received of (plaintiff) \$100 as part payment on a piece of property on the corner of," giving streets, city, county and State, and signed by the defendant. *Held*, not a sufficient memorandum within the statute of frauds.

BILL for specific performance. The opinion states the case.

W. T. Martin and Winchester & North, for appellant.

W. F. Mellen and Harris & George, for appellees.

PEYTON, C. J. This is an appeal from a decree of the chancery court of Adams county, dismissing a bill filed by the appellant

Holmes v. Evans.

against the appellees to enforce the specific performance of a contract for the sale of real estate in the city of Natchez, which is in writing, in the words and figures following, to wit:

“NEW ORLEANS, *June 25*, 1870.

“Received from M. Holmes \$100, as part payment on a piece of property on the corner of Main and Pearl streets, city of Natchez, county of Adams, State of Mississippi.

“ELIZA EVANS.”

The main question presented for our determination in this case is, is this receipt such a memorandum or note of the contract as is required by the statute of frauds to be in writing, and such as a court of equity may specifically enforce?

It is insisted, on the part of the appellees, that the contract is void for uncertainty in the description of the land intended to be conveyed. The question upon this point usually is, do the statements of the written instrument fill the measure of certainty and particularity required to constitute a contract? The books abound with cases raising that question, some of which we will now refer to. In *Abeel v. Radcliff*, 13 Johns. 297, an agreement to let a lot of land, without specifying for what term, was held void for uncertainty, and it was remarked that “every agreement which is required to be in writing by the statute of frauds must be certain in itself, or capable of being made so by reference to something else whereby the terms can be ascertained.” It was decided in *Parkhurst v. Van Cortland*, 1 Johns. Ch. 273, that a memorandum which professed to give the right to purchase or lease a certain lot of land, but which named no price or terms, was too imperfect to be treated as a valid contract. It was there also declared to be a settled principle that if the court cannot ascertain, with reasonable certainty, the terms of the agreement from the writing, or from some other paper to which it refers, the writing does not take the case out of the statute.

The general rule there stated has never been questioned. In that case there was an agreement to sell land, but the price to be paid by the purchaser and the time when the payments were to be made were not stated. In *Barickman v. Kuykendall*, 6 Blackf. 21, a memorandum as follows: “Received, the 18th of December, 1837, of J. H., \$500 in full, for one hundred acres of land, in part pay-

ment," and signed by the defendant, was held insufficient, and the plaintiff recovered back the \$500. The writing was defective in two respects: It did not locate the land or name the price; it could not be filled in by extrinsic evidence, for there was no foundation in the writing to place it upon.

In articles of agreement for the sale of land, the premises were not described or referred to in the agreement, so that it could be determined where they were. It was held that parol evidence was inadmissible to show their locality. The description was held to be void for uncertainty. *Taney v. Bachtell*, 9 Gill, 205.

There is, however, a class of cases where parol evidence may be resorted to, to show the locality of the land contracted to be sold. But this can be done only where the memorandum refers to something extrinsic, by which the land may be located and identified by means of parol proof; as, if a deed purports to convey the house and lot on which A. now lives, it is clearly competent to show by parol what property that description fitted at the time the language was used. *Tallman v. Franklin*, 14 N. Y. 589.

Nothing is more common, in preparing executory contracts for the sale of land, than to designate the premises by referring to them as the same described in some specified deed of conveyance, or as being the same of which some person named died seized, or by some other reference, whereby they can be readily ascertained and determined. Extraneous evidence so referred to, and any other evidence in connection with it, which may serve to identify and fix the limits of the land intended, is admissible and proper. There would appear to be no limit in that direction, except what is to be found in the general reference of the contract. For example, if a contract purports to embrace all the land owned by the vendor in a certain county, it would be admissible to prove any and all the land owned by him in that county.

In the case under consideration, the memorandum or receipt refers to no extrinsic fact by which it could be ascertained on which the corner of Main and Pearl streets, the land in controversy, is situated. And to allow parol evidence to establish its locality would be in violation of the statute, in allowing that to pass by parol which the statute says shall not so pass, and would open the door to all the mischiefs intended to be provided against by the statute.

Upon the whole, we are disposed to reaffirm the doctrine of the

Donnell v. The State.

case of *McGuire v. Stevens*, 42 Miss. 731; 2 Am. Rep. 649; and to hold that a receipt for a sum of money, expressing that it was the cash part of the purchase of a lot of land, without specifying the terms of the contract, is not such a memorandum as will take the case out of the statute against frauds and perjuries. *Ellis v. Doodman's Heirs*, 4 Bibb, 466; *Boardman v. The Lessees of Reed*, 6 Pet. 345; *Allen v. Bennett*, 8 S. & M. 681; 1 Greenl. Ev. 350, § 301.

The decree is affirmed.

DONNELL V. THE STATE.

(48 Miss. 661.)

Constitutional law — Civil rights bill of a State — excluding colored people from theaters.

A State statute provided that people of color should have equal privileges and accommodations with white people in public conveyances, theaters, places of popular amusements, etc., and imposed a penalty for a violation of the act. *Held*, that the statute was constitutional, and that the conviction of the lessee of a theater for denying admission and equal accommodations to colored men should be affirmed.

PETITION for a mandamus. The opinion states the case.

Nugent & Yerger, for relator.

J. S. Morris, attorney-general, for State.

SIMBALL, J. The relator, George Donnell, states in his petition for the writ of *habeas corpus*, that he is unlawfully deprived of his liberty by the sheriff of Hinds county; said sheriff claiming to detain and hold him under the judgment of the justice of the peace, imposing a fine of \$100 upon him, the relator, for depriving H. C. Carter and D. Webster of their equal rights and privileges, under what is commonly called the "civil rights bill," passed February 7, 1873, and also ordering that said relator should stand committed to the custody of the sheriff until said fine and costs are paid. The petition then recites a series of facts (not necessary to be noticed

here), which were intended to raise the question whether the relator had done any acts in violation of the statute.

The sheriff made return upon the writ that he held the relator in custody by virtue of the warrant of commitment of the justice of the peace, and filed a copy of it as part of his return. This is an extract from said paper in substance. George Donnell, being brought before the justice, charged, on the affidavit of H. C. Carter, with having refused to sell the said Carter a ticket entitling said Carter to admission to a public show or theatrical performance, given at a public hall in the city of Jackson, "because said Carter was a man of color, and, whereas, upon a due examination of the facts, * * * I (the justice) having found him guilty, as charged, of violating the act of 7th February, 1873, proceeded to pronounce the prescribed penalty." As appears from this extract, the relator was detained in custody, pursuant to a sentence or judgment of a justice of the peace, for a violation of the statute.

On the trial of the *habeas corpus*, the relator might, under section 410 (Code of 1871), offer evidence to contradict the return, "for such return shall not be conclusive of the facts therein stated."

The writ "extends to all cases of illegal confinement or detention whatsoever." Sec. 1396. How far shall the judge, before whom the relator was brought, proceed in the inquiry whether he is illegally confined or detained? It was competent for Donnell to have denied the existence of the judgment referred to in the return; that question would have been disposed of by an examination of the record of the trial before the justice of the peace. It would, also, have been competent to urge that the justice of the peace had no jurisdiction over the offense; and if that position were well taken, the judgment of conviction would have been void and the detention illegal. The relator might also insist that the act of the legislature has not the validity of law, because of its conflict with the constitution, and therefore what he did was not an offense.

It is manifest that the judge could not hear testimony and inquire whether the relator was guilty of the matters charged against him, or whether there was testimony enough before the justice to have sustained the conviction. This would have been to have tried the original case *de novo*. If the relator had desired a re-trial of his case on its merits, he ought to have appealed to the circuit court. The writ of *habeas corpus* is in nature of a writ of error, in so far as it brings into review the legality of the authority

Donnell v. The State.

by which the prisoner is confined. If that authority be the conviction by a justice of the peace or by a higher court, of a criminal offense, the judge is confined to the inquiry whether the conviction be void or not, for the want of jurisdiction, or whether the fact of which the relator has been convicted be a crime or not; and he cannot examine whether the conviction was right or wrong under the law and evidence.

In our view of the limits of the investigation, at the hearing of the *habeas corpus*, we must shut out of view altogether those facts and circumstances admitted or proved in the trial, which were offered for the purpose of proving that no offense had been committed, and therefore the justice of the peace ought to have acquitted the party. These facts did not "contradict the return" upon the writ. The only question then to be solved is, whether the conviction and sentence by the justice was in law a justification of the sheriff to hold his prisoner.

Events of such vast magnitude and influence, now and hereafter, have gone into history within the last ten years, that the public mind is not yet quite prepared to consider them calmly and dispassionately. To the judiciary, which ought at all times to be calm, deliberate and firm, especially so when the public thought and sentiment are at all excited beyond the normal tone, is committed the high trust of declaring what are the rules of conduct and propriety prescribed by the supreme authority, and what are the rights of individuals under them. As to the policy of legislation, the judiciary have nothing to do. That is wisely left with the law-making department of the government. A court only consults the policy of a law, as an aid to attain the legislative meaning and intent.

The 13th, 14th and 15th amendments of the constitution of the United States are the logical results of the late civil war, now more distinctly seen than immediately succeeding its termination. Practically, slavery had been abolished before the adoption of the thirteenth amendment. The truth was fully realized in this State, for the convention which met in August, 1865, declared that "slavery having been destroyed," it shall not hereafter exist in this State. Lest a question should be made as to the validity of the mode of its destruction, and to make its re-establishment impossible, the thirteenth article affirms "that neither slavery nor

involuntary servitude * * * shall exist within the United States, or any place subject to its jurisdiction."

The fourteenth amendment, *propria rigore*, incorporates the recently enfranchised colored race into the body of citizenship, by the words, "all persons born in the United States, or naturalized and subject to the jurisdiction thereof, are citizens of the United States, and of the State where they reside." Such constitutional provision was necessary to confer the citizenship, for although the thirteenth amendment insured perpetual freedom, the colored race would have been left under the operation of the rule declared by the supreme court of the United States, in *Dred Scott v. Sanford*, that none of the colored race could, as the constitution then was, become citizens of the United States. The article also inhibits the States from abridging the privileges and immunities of citizens of the United States, or to deny to any person within its jurisdiction the equal protection of its laws.

The fifteenth amendment is: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition." The final section to each of these articles is: "Congress shall have power to enforce this section by appropriate legislation."

The special object of the fifteenth amendment was to put the right of suffrage forever at rest, so that neither in the politics and legislation of the nation, or the State, could the irritating subject, as between the races, be ever agitated. That subject had been left open by the fourteenth amendment. Prior to the adoption of the fifteenth article, the power remained with the States to regulate suffrage. The second section of the fourteenth amendment enacted that, "if the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, or for the executive and judicial officers or members of the legislature, is denied to any of the male inhabitants of the State, twenty-one years of age, being citizens of the United States," * * * "the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in the State. Under this section, then, if a State chose to exclude any of its male citizens from the ballot (except for crime whereof the party has been convicted), it could do so, electing thereby to accept a reduced representation.

Donnell v. The State.

The danger to be apprehended under the power left with the States, under the fourteenth amendment, was that, in those States where the white race predominated, the ballot might be denied to the colored people ; and that, in those where the colored race was most numerous, the white race might be abridged in the right of suffrage. The fifteenth amendment makes that impossible, and guarantees to all citizens forever the elective franchise.

The fundamental idea and principle pervading these amendments is an impartial equality of rights and privileges, civil and political, to all "citizens of the United States," and of "the State where they reside," the same measure and rule of right "to vote," the same "protection of life, liberty and property," by "due course of law ;" "the equal protection of the laws to all within the jurisdiction of the State ;" "nor shall the State make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

These amendments, whilst affirmatory, and guarantees of certain rights and privileges, are also prohibitory upon the States from the doing of any thing to their prejudice and impairment.

A law which would discriminate injuriously against one portion of the citizens, abridging equal civil or political privileges, or which would afford less protection to life, liberty or property, to one class than another, would clearly violate these amendments. Equality of rights, privileges and capacities is the condition of all citizens, established by these organic laws. Special privileges can be conferred upon none, nor can exceptional burdens or restrictions be put upon any.

It is very difficult to define that very large residuum of legislative power which the State has. Cooley on Constitutional Limitations (572) says it has this extent: "To make rules for public order ; to suppress and punish crime ; to prescribe regulations for the intercourse of citizens with each other ; to insure good manners and good neighborhood, which may prevent a conflict of rights and insure to each the uninterrupted enjoyment of his own. In *Mayor v. Myler*, 11 Pet. 102, the supreme court say : "The State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered to or restrained by the constitution of the United States." We add : or. when not prohibited or excepted out of legislative control by its own constitution. The

court further add, "that it is not only the right, but the duty of the State, to advance the happiness, the safety and prosperity of its people, and provide for the general welfare, by every act of legislation which it may deem conducive to those ends." The most absolute and unqualified title to private property is held upon the condition that the owner will so use it as not to encroach upon the rights of others; and the State may rightfully interfere with the owner, so far as to control the use as that it shall not be seriously detrimental to others. *Commonwealth v. Alger*, 7 Cush. 84.

The utility and expediency of a law is often confounded with the question of its constitutionality. Full and plenary legislative power is inherent in the State, unless surrendered to or prohibited by the federal constitution, or withheld by its own. The State may pass all laws, unless the federal constitution or its own prohibit. The reverse is the rule with congress. The national government has limited powers, consisting of specific grants over particular subjects. A law of congress must be supported by a specific grant of power or by such incidental power necessary to give efficiency to the specific grant. The large subjects of the general welfare, safety, happiness and prosperity of the people of the State are committed to the legislature, to be advanced and promoted by legislation. If a law comes before the judiciary, touching a subject not given up to the national government, nor prohibited by the federal constitution, nor excepted out of legislative power in the State constitution, shall the judiciary listen to arguments founded upon its supposed inutility or inexpediency? That would involve the monstrous power of the judiciary sitting in review upon the legislative wisdom and discretion. It would be a palpable violation of the third article of the constitution, which prohibits the functionaries of either of these great departments of government, into which its powers are distributed, "from exercising any power belonging to either of the others." In the nature of things, the legislature must judge finally and conclusively of the fitness and adaptation of a law to promote the general good and happiness of the people, and its conclusion is obligatory upon the courts.

The remedy under our system of free institutions for unwise use of the legislative power is the ballot-box. Legislation is submitted at each recurring election to the popular approval or condemnation. The constituent body has thus reserved to itself the ultimate

voice to shape public policy and to indicate what is needful for the general welfare.

Upon the taxing power, the most delicate and most liable to be abused, there is no constitutional limitation as to rate, either upon congress or the legislature. Yet the ballot has always been efficient, in the end, to check and restrain abuses.

Guided by the rule, that to determine the validity of an act of the legislature we look not for the grant of power to pass it, but rather to see whether there is a constitutional provision restraining or prohibiting the legislation, let us examine so much of the statute of the 7th of February, 1873, as bears upon this case. The principle is so familiar that it hardly needs to be stated that one part of a statute may be valid whilst another may fall, for conflict with some article of the constitution.

The law amendatory of sections 2731 and 2732 of the Code of 1871, imposes more stringent regulations upon innkeepers, hotel-keepers, common carriers * * * and the owners, lessees or managers of theaters, and other places of public resort. It will hardly be denied that the legislature may, if it deems expedient, pass regulations applicable to each of these subjects.

Among those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain a *quasi* public relation to the community. The wayfarer and the traveler had a right to demand food and lodging from the innkeeper; the common carrier was bound to accept all passengers and goods offered for transportation, according to his means. So, too, all who applied for admission to the public shows and amusements, were entitled to admission, and in each instance for a refusal, an action on the case lay, unless sufficient reason were shown. The statute deals with subjects which have always been under legal control.

So much of it as is here involved is to this effect: "That all the citizens of this State, without distinction of race, color, or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation, advantage, * * * privilege, furnished by common carriers, innkeepers, * * * or by any owner, manager, or lessee of any theater or other place of popular amusement; and any person who shall violate the foregoing provisions, or who shall deny to or withhold from any person the enjoyment of any of the foregoing accommodations, * * * privileges,

* * * equally and impartially, on any such account, or who shall abridge or infringe the same, or incite thereto," shall incur the penalty denounced in the act. To constitute the offense there must be the denial, abridgment, or impairment of the equal and impartial accommodations mentioned in the statute, because of the "color," or previous condition of servitude of the person who applies.

The relator, in his petition for the writ, states that he had been convicted by the justice of the peace, of depriving H. C. Carter and Webster of the equal enjoyment of their rights under this statute. The return of the sheriff makes specific this general allegation, whereby it appeared that the relator had been found guilty, and so adjudged by the justice, of refusing to sell to H. C. Carter a ticket of admission to a theatrical performance in a public hall in the city of Jackson, used for that purpose, because said Carter was a person of color.

The intent of the law is, that all persons may have equal accommodations in the vehicles of common carriers, at the inns, hotels, theaters and other public places of amusement, upon the terms of paying the usual prices therefor. If any are excluded, it must not be on account of race.

We see no constitutional objection to that portion of the statute which has application to this case; counsel for the appellant has pointed to none, except the inhibition that private property shall not be taken for public use unless compensation be first made. It is not perceived in what manner this law infringes that section of the bill of rights. The assertion of a right in all persons to be admitted to a theatrical entertainment, and the punishment as an offense the act of the owner, lessee or manager, who denies or refuses to sell a ticket to a person for the reason asserted in these proceedings, in no sense appropriates the private property of the lessee, owner or manager, to the public use.

Let the judgment be affirmed.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

WELCH V. HOTCHKISS.

(39 Conn. 140.)

Municipal corporation — right to impose fees for licenses.

A municipal corporation was authorized by its charter to make by-laws regulating the erection of buildings. *Held*, that a by-law requiring a building license and imposing a license fee was valid.

DEBT by the plaintiff, as treasurer of the city of New Haven, to recover a penalty for the violation of an ordinance of the city against building without a license. Judgment below for the plaintiff. Defendant filed a motion in error.

Ingersoll, with whom was *Clark*, for plaintiff in error.

Doolittle, for defendant in error.

CARPENTER, J. The city of New Haven, pursuant to authority conferred by its charter, ordained certain by-laws to regulate the mode of building, and the materials used for erecting or altering building, within said city. Among them was one (Charter and Ordinances, p. 128, § 46), providing that no person should build or

enlarge any building, or remove any building from place to place in the city, or put any new roof or covering on any building within the fire district, etc., without a license or permit first issued therefor to the owner or person in charge of such building. The 43d section, page 129, prescribes a penalty for a violation of any of the provisions of the 40th section. The ordinance relating to licenses and permits provides that a small fee of fifty cents shall be paid for a license to erect, enlarge or add to any building.

It is conceded that the defendant violated section 40, and that he is liable to the penalty, provided that section, construed in connection with the ordinance requiring the payment of a license fee, is valid. This action is brought to recover that penalty. The defendant demurred to the declaration. The court below overruled the demurrer, and the defendant brings the record before this court by motion in error.

No question is made in respect to the form of the action, or to the legal sufficiency of the matter alleged, provided the by-law is valid. The validity of the by-law, therefore, is the sole question in the case, and that question hinges entirely upon the license fee required.

The power of the court of common council to make by-laws regulating the matter of erecting and altering buildings within the city limits is not questioned. That the by-laws ordained for that purpose are, in themselves, reasonable and proper is not disputed. But it is contended that the ordinance requiring the payment of a fee for a license to build is unauthorized; and, therefore, that the ordinance requiring a license, and inflicting a penalty for building without one, is inoperative and void. The objection is that the fee to be paid for a building license is a tax for revenue purposes; that the charter confers no power upon the city to levy such a tax; that it is a sum paid for which no consideration or equivalent is given in return; that it is unequal in its operation, the same fee being required for all classes of buildings without regard to size or expense; and that the power thus to tax implies and carries with it the power to require such a fee as would prevent owners from building at all, and thus comes in conflict with the fundamental rules of law, and operates as a restraint of trade.

If it is to be regarded as a revenue tax, it might be liable to some or all of these objections. But we are of the opinion that it is not a tax, in any proper sense. It is rather a reasonable sum collected

of the party, intended for the purpose of defraying, in part, the necessary expense attending the issuing and recording the license. As such it is open to none of these objections. The objections that it is unequal, without consideration, and a restraint of trade, at once disappear and require no further notice. The objection that the city has no power to demand a license fee requires further consideration.

It may be conceded that we do not find, in express terms, such a power in the charter; but we think it is there nevertheless; not so much, perhaps, by necessary implication, as by intendment, gathered from the presumption that the legislature would not deem it necessary to specify matters of so little importance, and which are incidental in their nature, but which, notwithstanding, are convenient, if not essential, to the full enjoyment of the powers expressly granted.

It seems equitable and just that expense of this character should be paid by those for whom, and at whose instance, they were incurred, and we do not consider it a strained interpretation of the charter to hold that the legislature so intended. We think that this proposition will not be disputed; that whenever a municipal corporation is authorized to make by-laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto to obtain a license therefor, the reasonable cost of granting such license may be properly charged to the persons procuring them, although the power to do so is not expressly given in the charter.

There can be no question as to the propriety of superintending and regulating the erection and alteration of buildings in the city, so far as to see that they conform to the regulations for preventing fire. This is demanded for the safety and welfare of the public at large, and especially of residents and property holders in the city. This duty is imposed upon the fire marshal. In order that he may discharge it thoroughly and systematically, it is essential that he should know what buildings are to be built or altered, and by whom, the mode of construction, the materials to be used, the location and dimensions of the buildings when complete, and the purposes for which they are to be used. To that end a written application, stating details, and signed by the owner or proprietor, is required; which application must be numbered and registered, and if the fire marshal and street inspector are satisfied that the work

Atwood v. Holcomb.

will be in accordance with the city ordinances, they shall sign and issue a license or permit therefor. A record of these licenses is to be kept, and blanks for the application and the license are to be furnished by the city. The work done under the license must be inspected from time to time, to see that it conforms to the conditions of the application and the city ordinances. All this involves expense, which must by far exceed the aggregate amount of license fees collected. This whole expense is incurred more particularly for this class of persons, and is necessary in order that they may enjoy the use of their own property, but in such a manner as not to expose their neighbors to unnecessary annoyance and risk. It is reasonable and just that they should bear a fair proportion of that expense. The by-laws in question require nothing more.

For these reasons we are satisfied that there is no error in the judgment of the court below.

In this opinion the other judges concurred.

ATWOOD V. HOLCOMB.

(39 Conn. 370.)

Parent and child — emancipation — fraudulent conveyance.

A father, although insolvent at the time, may make, in good faith, a valid gift to his minor son of his time and future earnings

TROVER. The opinion states the case. The judgment below was for the plaintiff, and defendant moved for a new trial.

Mr. Perkins and *W. C. Case*, for the motion, cited *Ensworth v. Davenport*, 9 Conn. 393; *Remington v. Cady*, 10 id. 47; *Davenport v. Lacon*, 17 id. 281; *Bray v. Wallingford*, 20 id. 419; *Reeve's Dom. Rel.* 423; *Chase v. Elkins*, 2 Vt. 290; *Bray v. Wheeler*, 29 id. 514; *Jenney v. Alden*, 12 Mass. 375; *Winchester v. Reid*, 8 Jones' Law (N. C.), 377.

Mr. Goodman, contra.

SKYMOUR, J. This case was tried in the court of common pleas and judgment there given for the plaintiff. The defendants seek

Atwood v. Holcomb.

for a new trial. In their brief the defendants' counsel state the facts thus:

On the 28d of March, 1867, the plaintiff was indebted to the defendant Holcomb and was insolvent. He had a son Arthur, seventeen years of age, and on that day gave him a letter of emancipation, by which he agreed that his services and future earnings, which then belonged to the plaintiff, should belong thereafter to the son. There was no consideration whatever for this gift. In September of that year Arthur negotiated for the purchase of a colt with one Hays, who completed the sale with the plaintiff's wife, and conveyed the title to her in the same month. She paid therefor \$5 of her own, and Arthur thereafter caused \$22.50 of his wages, earned after the date of the letter of emancipation, to be paid as part payment for the colt. This colt was afterward exchanged for a horse. The defendants caused this horse to be attached in a suit against the plaintiff, and the plaintiff brings trover as trustee for his wife.

Upon these facts the defendants' counsel make the question, was the gift of the father to the son, of the avails of his labor thereafter, a valid one as against those who were creditors of the father at the time? On examining the record it does not distinctly appear that the debt of the defendant Holcomb was prior in time to the letter of emancipation, but from what was said by counsel in the discussion we suppose in truth it was prior, and shall decide the case upon that as being the fact. In regard to the insolvency of Mr. Atwood, the father, the finding is that at the time of the attachment he was, and for many years previous had been, shiftless and unable to pay his debts.

If the obligation of a minor child to labor for his father is in the nature of an ordinary debt and properly a thing in action like a bond or promissory note, the argument of the defendant would have full force, that the father must be just before he is generous, and could no more forgive to his son the obligation of personal service, to the prejudice of creditors, than he could give away a valuable bond. But there are differences between an ordinary debt and a child's obligation to serve his father. If Mr. Atwood had died insolvent on the day of the date of the letter of emancipation, the law itself would have done for the son what the father attempted to do. The law would have given the son his time, and his earnings would thereafter have been his own. Neither the defendant,

nor any other creditor of the father, would have any claim on the son that he should labor for the benefit of his father's estate. This duty of service is not assets like a bond in the hands of an administrator for payment of debts, nor for any purpose. So, too, in case of bankruptcy, it is clear that the father's right to his children's services does not pass as assets for the benefit of creditors to the assignee in bankruptcy. The son, therefore, is not in law regarded as an ordinary debtor to his father, nor is the father's right to the son's services regarded in law as mere property either in possession or in action. The right and the duty are in the main personal, and are founded on the intimate relation that during minority must necessarily exist between the parties. The age of twenty-one years is fixed by law as the utmost period of the relation, but it may be terminated before that period by the mutual agreement of the parties, so as to put an end to the duty of personal service. This was decided in *Wellon v. Morse*, 6 Conn. 547. The law wisely permits the father to consult the genius, capacity and inclination of his son, and, if he thinks it best that his child should be stimulated to industry by receiving the fruit of his own labor, or best that he should before twenty-one be put upon his own resources to earn a living, he may by law anticipate the usual period of majority, and release to him all claim upon his earnings.

The father by statute, with the minor's consent, may bind his son as an apprentice to learn a useful trade, thus transferring to the master the right of service. And, in such case, the practice is to give to the minor child the whole benefit of his labor, either in instruction or in board and clothing, and, if a sum of money is to be paid at the end of the apprenticeship by the master, it is usual, and, we suppose, universal, to stipulate for its payment to the son himself, and not to the father. Cham. Com. Law, 377, 846. Now, by such indentures of apprenticeship, the father relinquishes to the son the benefit of the son's service, and the father's creditors may be affected by it as much as the creditors of Mr. Atwood are affected by the emancipation in the case before us. But we think the law does not permit creditors to control the father's freedom in the important matter of dealing with his son's time and employment as the best interest of his son may seem to require. By the law of nature, every person is entitled to the fruit of his own labor and skill. Municipal law, which gives to the father the earnings of his children during their minority, does not intend to

Atwood v. Holcomb.

contravene this law of nature, but merely to modify it, giving to the father the control of his children's earnings as the means of providing for their maintenance and education, under the idea that the father is more capable than the child to direct his industry and supply his wants, and under the further idea that the parent will use his power with paternal regard for the best interests of his child, and not a mere means of profit to himself. Hence, it is settled law that, if the father abandons the child, and leaves him to provide for himself, the child becomes entitled to his earnings as a means of support, and the father has no claim upon them to reimburse himself for past expenses incurred in infancy. *Nightingale v. Withington*, 15 Mass. 272. So, too, by marrying during minority, a daughter is freed from all legal obligation to labor for her father.

If, therefore, by mutual consent, a child is emancipated before arriving at the age of twenty-one, and is left to provide for himself under an agreement that his time shall be his own, we think the father's creditors have no ground to complain of the arrangement. The father relinquishes nothing which was intended as a source of profit to him, he merely remits his son to his natural rights at an earlier period than that fixed by law. If, however, such arrangement is merely colorable—a mere sham to protect the son's wages from creditors, while as between the parties the father still is to control and have the benefit of them, then the transaction is void as against creditors. So, too, after wages are actually earned before emancipation, the gift of such wages or their proceeds to the son would be subject to the ordinary rules which govern voluntary conveyances of property. Probably Judge REEVE had such a case in his mind when he penned the sentence in his valuable treatise on domestic relations on which the defendants rely. The case before us relates to wages earned by the son after he had been emancipated, after he had reason to suppose that he was laboring for himself under an arrangement which appears to have been proper under the circumstances and made in good faith.

The father was shiftless and unable to pay his debts. Such instances are unfortunately too common, where the head of the family fails to provide comfortably for the household and is discouraged by the burden of debt from attempting much to improve his own condition or that of his family. In this state of things a son seventeen years of age proposes to start for himself and with his own earnings to provide his own food, raiment and education.

Hoyt v. Holly.

The father consents, and the son by the labor of his own hands earns a few dollars, and we are called on to decide between the son's title and that of his father's creditors to these earnings. In a case somewhat analogous, of the wife's earnings, which at common law belong to the husband, our statutes have carefully protected the proceeds of her labor from her husband's creditors and secured them to her own use. These statutes proceed upon the same principle of natural law and justice which we feel bound to apply to a child's wages, in cases like the present. Those statutes, however, go much further in the protection of the wife's earnings than we are called on to go in favor of a child's, for as already stated, the son's wages earned before emancipation are regarded as his father's property, and of course like other property are liable to attachment.

We have carefully examined the authorities cited by the counsel for the defendants, but we find no case which favors their claim, and though perhaps no case has gone the full length claimed by the plaintiff, yet the language of the judges in Massachusetts, Vermont and Pennsylvania is in conformity with the views which we have expressed; and both on principle and authority we think the decision of the court of common pleas was correct, and we therefore advise no new trial.

In this opinion, the other judges concurred.

HOYT V. HOLLY.

(39 Conn. 336.)

Physician—sale of good will—Public policy.

Plaintiff, a physician, being about to remove from the town where he lived, agreed with defendant, also a physician, in consideration of \$500, to recommend him to his patients, and to use his influence to induce them to employ him. *Held*, that the agreement was lawful, and not against public policy. (PARK and SEYMOUR, JJ., dissenting).

MOTION for a new trial in an action of assumpsit. The judgment below was for the plaintiff. The opinion states the case. '

Hoyt v. Holly.

Curtis and *Hoyt*, for the motion, cited *Nichols v. Mudget*, 32 Vt. 545; *Frost v. Belmont*, 6 Allen, 152; *Devlin v. Brady*, 36 N. Y. 531; *Bloss v. Bloomer*, 23 Barb. 609; *State v. Hartford*, 29 Conn. 538; *Fuller v. Dame*, 18 Pick. 472; *Debenham v. Oz*, 1 Ves. Sr. 276; *Austen v. Boys*, 37 L. J. Ch. 714.

Olmstead and *Child*, contra, cited *Mitchel v. Reynolds*, 1 P. Wms. 181; *Chesman v. Nainby*, 2 Stra. 739; *Davis v. Mason*, 5 T. R. 120; *Hutton v. Lewis*, id. 639; *Bunn v. Guy*, 4 East, 190; *Butler v. Burlison*, 16 Vt. 176; *Hathaway v. Bennett*, 10 N. Y. 108; *Bradbury v. Bardin*, 35 Conn. 577.

FOSTER, J. It appears from the motion in this case that at the time of entering into the contract out of which this suit has arisen, both the parties were practicing physicians in the town of Greenwich, the plaintiff at the village of Greenwich, and the defendant at Round Hill.

The plaintiff, being about to leave the village and establish himself in practice in the adjoining town of Stamford, proposed to the defendant to remove from Round Hill to Greenwich village, and take the plaintiff's place. The plaintiff agreed to recommend the defendant to his patrons and patients in the village and vicinity, and to use his influence to induce them to employ him. It was mutually understood that the plaintiff reserved the right to practice in the village and vicinity, when called on to do so.

The plaintiff removed to Stamford, and the defendant came to the village, occupying for a time the office previously occupied by the plaintiff, going into practice, and holding himself out, by advertisement and otherwise, as the successor of the plaintiff. The motion finds that the plaintiff fulfilled his part of the agreement, and this suit is brought to recover the \$500, which was the consideration agreed to be paid to the plaintiff by the defendant on his part. The judgment below was in favor of the plaintiff.

This motion for a new trial rests on three grounds: 1. That the contract is void as being incapable of performance. 2. That it is void as being contrary to public policy. 3. That it is not the sale of a good-will of a business; the business of a professional man being a personal trust and confidence, not a subject of sale. Because the plaintiff reserved the right to practice in the locality, when called on to do so, we do not think it therefore became impossible for him

Hoyt v. Holly.

to recommend the defendant, and to exert his influence to induce his patients to employ him. That fact might affect the value of the recommendation ; it might diminish the weight of the influence; but certainly it would not necessarily prevent the recommendation from being made, the influence from being exerted. Besides, a conclusive answer to this claim is, the finding in the motion that the plaintiff fulfilled his part of the agreement.

This contract would no doubt be void, if it belonged to that class of contracts to which it is likened by the defendant's counsel. We distinguish it from cases of a promise to pay another for soliciting a will to be made in his favor, or for procuring a marriage between certain parties, and other analogous cases. No principle of law or public policy is violated by the carrying out of this contract.

As to the question of the sale of the good-will of a professional business, without entering upon an examination of the various cases from *Bunn v. Guy*, 4th of East, to that of *Austen v. Boys*, 27 L. Jour. Ch. 714 ; S. C., 2 DeGex & Jones, 626 ; 22 Jur. 719, we feel warranted in saying that a practicing physician may make a sale of his situation, may lawfully make such a contract as was here made. We find nothing exceptionable in the rulings and decision of the court below, and the motion for a new trial must therefore be denied.

In this opinion, BUTLER, C. J., and CARPENTER, J., concurred. PARK, J., was of opinion that the plaintiff's agreement, in consideration of the money to be paid him by the defendant, to recommend the defendant to his patrons and patients, and endeavor to induce them to employ him, was contrary to good policy and rendered the whole contract void on that ground. He therefore dissented.

SEYMOUR, J., also dissented.

Stockwell v. Campbell.

STOCKWELL V. CAMPBELL.

(39 Conn. 362.)

Fixtures—portable furnaces.

Portable hot-air furnaces used for warming a dwelling-house, set in pits prepared for them in the cellar, and kept in place by their own weight, are part of the realty; as also are the pipes leading from the furnaces to the chimney.

BILL to foreclose a mechanic's lien on a building. The respondent was the owner of the building, which was arranged for heating by portable hot-air furnaces, and pits for the same were constructed in the cellar. Before the building was completed the respondent ordered of the petitioner two furnaces and the pipes, which the petitioner supplied and placed in the building. The furnaces were portable coal furnaces, not set in brick nor fastened to the house, but held in their place by their own weight. The smoke pipes were similar to ordinary stove pipes, and could be removed without injury to either the chimney, the furnace or the pipes. The furnaces could be removed and reset without injury to either themselves or the house. The claim of the petitioner was for the furnaces and the pipes, and for labor in placing the same. The contract relative thereto was independent of any contract relating to the construction of the building. The petitioner claimed a lien upon the entire house.

The court reserved the question.

G. H. Hollister and D. F. Hollister, for petitioners, cited 3 Redf. on Wills, 163; *Alverdt Carriage Manuf. Co. v. Gleason*, 36 Conn. 86.

Mr. Seeley, for respondent, cited *Rose v. Persse & Brooks' Paper Works*, 29 Conn. 256, 267; *Chapin v. Persse & Brooks' Paper Works*, 30 id. 461; *Capen v. Peckham*, 35 id. 88; *Lombard v. Pike*, 33 Me. 144; *Millikin v. Armstrong*, 17 Ind. 456; *Morgan v. Arthur*, 8 Watts, 140; *Houck on Liens*, § 163.

PARK, J. The question in this case is, whether the furnaces and the smoke-pipes attached to them were fixtures. If they were,

they were parts of the buildings to which they were attached, and the fact that a separate contract was made in reference to them becomes of no importance, for a mechanic, in constructing any part of a building, has a lien on the whole building for the labor performed and materials furnished. The claim of the respondent would deprive the mechanic of his lien unless the entire building was constructed by him under one contract, which manifestly is absurd.

We come then to the only question in the case, and that is, were these articles fixtures?

In the late case of *Capen v. Peckham*, 35 Conn. 88, this court held "that to constitute a fixture it is essential that the article should not only be annexed to the freehold, but that it should clearly appear from an inspection of the property itself, taking into consideration the character of the annexation, the nature of the article annexed, its adaptation to the uses and purposes to which the building was appropriated at the time the annexation was made, and the relation of the party making it to the property to which it was annexed, that a permanent accession to the freehold was intended to be made by the annexation of the article." Again the court says: "If the articles in this case had been ponderous and extremely difficult to be removed; if they had been of considerable value taken in connection with the building, and of little value as chattels to be removed; if they had been fitted to the places they occupied and would not be suited to other places or buildings unless specially prepared for them, such considerations might go far to show that the articles were fixtures."

The articles in that case were the ordinary implements of a slaughter-house. They were put into the building to be used in the slaughter of animals. With the exception of a windlass, all the articles could easily have been removed to and set up in any other slaughter-house without any injury to the building from which they were taken or to themselves; and they would have been as valuable and useful in their new location as in the places they then occupied. The court held the windlass to be real estate, for the annexation of the article was deemed sufficient to show that it was designed to be so by the party making the annexation; but inasmuch as there was nothing to indicate such intention in reference to the other articles, they were held to be personal property.

This rule, which requires a physical annexation of the article to

Stockwell v. Campbell

the building, we consider well settled, but the annexation need not be such as to require any actual disruption for its removal. It may be attached to the building by mere adjustment of construction and putting in place, as in the case of doors and window blinds, which are obviously a part of the building, though attached only by hinges, or it may be held in a place prepared to receive it, by its mere size and weight, as in the present case. Thus, in the recent case of *Alvord Carriage Manuf. Co. v. Gleason*, 36 Conn. 86, the court held that a factory bell, hung in a tower built upon the factory to receive it, was a part of the realty. It is thus that the water wheel of a mill is always held to be a part of the mill. In all these cases the article is applied to the building in such a way as to show an intent to annex it permanently to the freehold; the annexation, whether by means of nails, or screws, or hinges, or mere weight, being still a physical annexation. The precise manner in which the article is kept in place is not important, except as it may often throw some light upon the question, in a doubtful case, whether a permanent annexation was intended.

In the present case, the intent to make the annexation permanent is very clearly shown by the preparation of the house for the reception of the furnaces. Pits were made in the bottom of the cellar adapted to them in size and depth, and for the express purpose of receiving them. In this respect the case in the 36th of Conn. R., just referred to, seems to be directly in point. There the place where the bell was hung was prepared expressly for it, and the fact that it was so prepared, and that the bell was hung in it, showed that the annexation of the bell to the building was intended to be permanent.

The smoke-pipes connecting the furnaces with the chimneys of the house are, of course, equally annexed to the building, and a part of the realty.

We, therefore, advise judgment for the petitioners.

In this opinion the other judges concurred.

AYER V. CITY OF NORWICH.

(39 Conn. 374.)

Nuisance — objects in highways likely to frighten horses.

Objects within the limit of a highway which, in their nature, are calculated to frighten horses of ordinary gentleness, may be nuisances which make the highway defective within the meaning of a statute requiring towns to keep their highways "in good and sufficient repair." Whether in any case such an object is a nuisance is a question of fact for the jury. (*See note, p. 400.*)

ACTION on the case for an injury from an alleged defect in defendant's street. Verdict for plaintiff. Defendant moved for a new trial. The opinion states the case.

Harvey & Pratt, and Halsey, for the motion.

Brandegge & Park, contra.

CARPENTER, J. A tent, standing within the limits of the highway, and partly upon the traveled path, was so constructed and decorated as to be an object of terror to horses. The plaintiff's horse being frightened thereat, she was thrown from the carriage in which she was riding, whereby she was seriously injured. The action is brought to recover damages for such injury, the plaintiff claiming that the tent constituted a defect, or want of repair, in the highway, so as to render the defendants liable.

The counsel for the defendants requested the court to charge the jury "that if the only defect complained of was the tent, and that was so situated with reference to the plaintiff's wagon that she could not by any possibility, as she was driving along the street, come in collision with the tent, and that it was only a defect from its appearance, then it was not such a defect as would subject the defendants under the statute, even if it stood on the traveled path of the street." The court did not so charge the jury, but instructed them as follows :

"It is made by the law of this State the duty of the defendants to cause the highways, within the limits of the city of Norwich, to be kept reasonably safe and convenient, and they are liable to trav-

Ayer v. City of Norwich.

elers for injuries caused by the neglect of this duty. A highway may be rendered unsafe by objects thereon that are in or upon the traveled path, which are calculated to frighten horses of ordinary gentleness when driven thereon, and which obstruct the travel on the highway, as well as by defective construction. If the jury find that this tent was on some portion of the traveled path of the highway over which the public were accustomed to pass with horses, carriages and teams, and was, in its general operation, calculated to frighten horses of ordinary gentleness, and if they also find it to have been of such size and character as to obstruct travel, then it was a nuisance that it was the duty of the defendants to remove, and rendered the highway defective within the meaning of the statute."

The jury returned a verdict for the plaintiff, and the defendants move for a new trial for the refusal to charge as requested, and for a misdirection.

The real question in the case may be stated thus: Will an object, in any case, be a defect in a highway under our statute, simply because, by its general operation, it is calculated to frighten horses of ordinary gentleness? If, as matter of law, such an object cannot be a defect, the defendants are entitled to a new trial; otherwise, not.

This question has already been decided by this court in the affirmative (*Dimock v. Suffield*, 30 Conn. 129); and that decision has been accepted by the court and the bar as the law of the State. That disposes of the question now before us unless we are prepared to overrule that case. We cannot regard that decision as mere *obiter dictum*, as suggested by the defendants' counsel. This very question was argued by able counsel, and the opinion by the court upon it is explicit. The mere fact that the case was decided for the defendants upon another point does not weaken the force of the decision.

But the defendants insist that the doctrine of that case is not in harmony with the spirit of our statute, as interpreted in *Chidsey v. Canton*, 17 Conn. 475, and *Hewison v. New Haven*, 34 id. 136. In the former it was held that the town was not liable for consequential damages, such as the loss of service, expenses of nursing, etc., resulting to a person from injuries to his wife and daughter by reason of a defective bridge. In the latter it was held that the city was not liable for an injury caused by the falling of a weight sus-

pended over the street insecurely by a private party. In both cases the court refused to extend, by construction, the liability of towns to cases not within the letter or spirit of the statute. Neither case involved the question of liability for objects causing injuries by frightening horses. If, therefore, this case may be fairly said to be within the reason and spirit of the act, we are not precluded by the cases referred to from holding the defendants liable.

The statute makes it the duty of the defendants to keep the highway "in good and sufficient repair." The liability imposed by a subsequent section is designed to enforce this duty. The object of the statute is to compel towns to keep the highways reasonably safe and convenient for travel. *Dimock v. Suffield, supra*; *Munson v. Derby*, 37 Conn. 298. Here is an object entirely foreign to all the legitimate uses of a highway, permitted to stand within the limits, and partly upon the traveled path, of the principal thoroughfare in a populous city, for a period of four days. The jury found that it "was in its general operation calculated to frighten horses of ordinary gentleness;" and that it was of "such size and character as to obstruct travel." That such an object renders the use of a highway unsafe and inconvenient will admit of no question. It is reasonable, therefore, to suppose that the legislature intended to make it the duty of the defendants to remove the object and to make them liable for a neglect of this duty.

We are aware that in Massachusetts a different doctrine is established. *Keith v. Easton*, 2 Allen, 552; *Kingsbury v. Dedham*, 13 id. 186; *Cook v. Charlestown*, 98 Mass. 80. On the other hand, in Vermont, New Hampshire and Wisconsin the rule adopted in Connecticut seems to be well established. *Morse v. Richmond*, 41 Vt. 443; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Glen Haven*, 25 Wis. 288; 3 Am. Rep. 73. Some of the later cases cite *Dimock v. Suffield* as an authority.

The fact that our sister States differ on this subject has induced us to give it a careful examination.

The object in this case belongs to a class of nuisances relating directly to the appropriate use of the highway. Indeed, independent of the use of the highway with horses, it can hardly be said to be a nuisance at all, except as it encroached upon the traveled path. There is little danger that a carriage will come in actual collision with such a tent; and if it does the tent will be much more likely to receive harm than the carriage. The danger consists in the ina-

Ayer v. City of Norwich.

bility to drive horses of any spirit by it, or near it, without fright, resulting probably in accident and injury. That danger extends to a large proportion of the horses used. Comparatively few horses are more than ordinarily gentle. Such horses might, and probably would, pass quietly and safely. But with a vast majority of horses it is otherwise. They would be sure to see the object and be more or less frightened by it. The danger is imminent that they will become unmanageable, or that something about the vehicle or harness will give way, and that an accident will be the result. A hole in the road at that place would be far less dangerous. Nine out of ten carriages might pass it without horse or driver noticing it. If seen it could be easily avoided. One out of a large number might, by accident, get into it and be injured. On the other hand, the tent in the present case was almost certain to frighten any horse driven near it, and the safety of those concerned depended largely upon the skill of the driver or strength of the harness. Take the case of *Cook v. Charlestown* before referred to, as another illustration. The nuisance there was a dead horse in the street. A horse driven by was frightened and the plaintiff injured. It was held that he could not recover inasmuch as the wagon did not actually come in contact with the obstruction. Practically none but a blind or spiritless animal could be driven near enough to it for such contact; and those that could, could be easily controlled. All others would be sure to avoid it. The chances of an accident by actual contact are small indeed when compared with the chances by fright. That decision, as it seems to us, affords almost absolute immunity for one of the most dangerous nuisances that will be likely to exist.

We can understand that the Massachusetts cases make a distinction between injuries resulting from actual contact with an object, and injuries resulting from fright occasioned by the same object; and that the practical application of such a distinction is free from difficulty. But any other reason for the distinction is not so apparent.

It is conceded that the object is a nuisance. It must also be conceded that the nuisance in both cases is the direct and immediate cause of the injury, and that the injury is the natural and probable consequence of the nuisance. If I strike a horse and cause him to run, whereby persons in the carriage are injured, I am liable in trespass for all the damage. If by my negligence I frighten him and thereby cause injury, I am liable in case. If a town or other

corporation by its negligence produce the same result, why should it not be liable? We must confess we are unable to discover any good reason for holding towns liable for injuries caused by collision and not liable for injuries caused by fright. The cause and effect in each case being the same, the manner and detail are unimportant.

We fully agree with that distinguished court, and so held in *Hewison v. New Haven*, that there is a large class of nuisances which may cause injury to persons in the use of a highway, for which towns are not liable; and we agree that there are very many objects which may frighten horses upon the highway, in relation to which no duty devolves upon the town, and, therefore, in case of injury, no liability attaches. But the fact that a horse may be frightened at a piece of paper or the rustling of leaves, is no reason why the town should not remove a dead horse, or a frightful looking tent.

The character of the object, however, should be such as to make the danger obvious and the duty of the town clear. In respect to this no rule can be laid down which will indicate clearly and definitely the line between immunity and liability. It is, and must be, from the nature of the case, in the main, a question of fact for the jury. We only determine that such nuisances *may* be defects; whether they are so or not, the jury, upon a consideration of the character of the object, its situation, the amount of travel, and all the circumstances, must determine. This question, like all other questions of negligence, we think may be safely left with the jury.

In conclusion, we are satisfied that the law is, and ought to be so, that objects within the limits of a highway, which in their nature are calculated to frighten horses of ordinary gentleness, may be nuisances which make the highway defective within the meaning of the statute, and which the town or corporation charged with the duty of maintaining the highway is bound to remove.

A new trial is not advised.

In this opinion the other judges concurred.

NOTE. — In the subsequent case of *Young v. The City of New Haven*, 39 Conn. 435, the decision in the foregoing case was adhered to. In that case the horse was frightened by a steam roller used in repairing the street, and which had been left by the side of the street during the suspension of work from Saturday to Monday. The roller was a very useful instrument, but the court held that this made no difference as to the principle of law. CARPENTER, J., dissented on the ground that the rule "should be limited to those cases in which individuals have been permitted to obstruct the highway for private purposes, or where the object constituting the obstruction is in itself a useless nuisance." — REP.

MERIDEN BRITANNIA COMPANY v. PARKER.

(39 Conn. 450.)

Trade-mark—proper name as part of trade-mark—imitation of stamp.

Three brothers named Rogers had acquired a reputation in the manufacture of plated spoons and forks. Petitioners purchased from them the right to manufacture and sell plated spoons and forks stamped with the name "Rogers," and thereupon adopted and used as their trade-mark the words and figures: "1847, Rogers Bros., A 1." The said brothers were also employed by the petitioners in the manufacture of their goods. The goods so manufactured and stamped with the said trade-mark, acquired a good reputation in the market. Subsequently three brothers of another family named Rogers, not previously engaged in the business, made an arrangement with the respondent to manufacture for them, and also on his own account, plated spoons and forks. These were stamped, "C. Rogers Bros., A 1," and "C. Rogers & Bros., A 1." It was found that these stamps resembled the petitioners' trade-mark to that degree that they were calculated to deceive, and did deceive "unwary purchasers;" that large quantities of respondent's goods had been sold by him upon the reputation of petitioners' goods, and that respondent supposed that the resemblance of his stamp to the petitioners' would enable him, more readily to sell his goods. *Held*, that the petitioners had a right to protection in the use of the stamp, "1847, Rogers Bros., A 1," as a trade-mark; and (2) that the respondent was violating that trade-mark by using a stamp so nearly resembling the petitioner's and that, therefore, respondent would be restrained from using his said stamp, and also from using the name "Rogers Bros." *Held*, also, that the use of the name "Rogers" would not be restrained. (*See note, p. 409.*)

BILL in equity to restrain the use of a trade-mark. The court reserved the case for advice. The opinion states the facts.

H. B. Harrison and *O. H. Platt*, with whom was *Hicks*, for petitioners, cited *Croft v. Day*, 7 Beav. 84; *Edleston v. Vick*, 23 Eng. Law & Eq. 51, 56, 57; *Rodgers v. Nowill*, 5 Mann., Grang. & Scott, 109; *Curtis v. Bryan*, 2 Daly, 312; *Walton v. Crowley*, 3 Blatch. 440; *Dale v. Smithson*, 12 Abb. Pr. 237; *Dixon v. Guggenheim*, 3 Am. Law Times, 288; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manuf. Co.*, 37 Conn. 278, 297; *Stewart v. Smithson*, 1 Hilt. 119; *Bradley v. Norton*, 33 Conn. 157; *Kerr on Injunctions*, 478, 481, 483; *Millington v. Fox*, 3 Mylne & Cr.

Meriden Britannia Company v. Parker.

338; *Coffeen v. Brunton*, 4 McLean, 516; *Davis v. Kendall*, 2 R. I. 566; *Leather Cloth Co. v. Am. Leather Cloth Co.*, 1 Hem. & Mil. 271; S. C., 29 Jur. 513; *Filley v. Fassett*, 17 Am. Law Reg. 402; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 405; *Howe v. The Howe Machine Co.*, 50 Barb. 236; *Congress Spring Co. v. High Rock Spring Co.*, 57 id. 526; *Sykes v. Sykes*, 3 Barn. & Cress. 541; *Lockwood v. Bostwick*, 2 Daly, 521; *Rogers v. Taintor*, 97 Mass. 297; Upton on Trade-marks, 52, 53, 73, 79, 204, 207, and cases there cited.

Ingersoll & Wright, for respondent, cited *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; *Canal Co. v. Clark*, 13 Wall. 311; *Cox's Trade-mark Cas. Appendix*, 722; *Churton v. Douglass*, 23 Jur. 890; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manuf. Co.*, 37 Conn. 278; *Leather Cloth Co. v. Am. Leather Cloth Co.*, 29 Jur. 513; *Partridge v. Menck*, 2 Sandf. Ch. 622; *Samuel v. Berger*, 24 Barb. 163; *Palmer v. Harris*, 60 Penn. St. 156; *Pidding v. How*, 8 Simons, 477; *Hobbs v. Francais*, 19 How. Pr. 567; *Croft v. Day*, 7 Beav. 84; *Bradley v. Norton*, 33 Conn. 157; *Thomson v. Winchester*, 19 Pick. 214; *Burgess v. Burgess*, 17 Jur. 292; S. C., 17 Eng. Law & Eq. 260; *Faber v. Faber*, 49 Barb. 357; *Kerr on Injunctions*, 480; Upton on Trade-marks, 9, 25, 26, 30, 47, 53, 66, 98, 99, 110.

CARPENTER, J. The report of the committee contains an elaborate statement of facts, many of which are immaterial in themselves, but important only as being evidential of other facts which are material; there is also a reference to a large mass of documentary evidence used on the trial, all of which is simply evidence tending to prove the material facts in controversy. In this connection we may add that many of the questions discussed in the able and exhaustive arguments to which we listened, are questions of fact. Of course it is not our province to decide such questions, and we shall not attempt to do so. We think, however, that the essential facts are sufficiently found. They may be stated in comparatively few words.

In 1847 three brothers, William, Asa H. and Simeon S. Rogers, commenced the business of manufacturing plated ware, especially plated spoons and forks. They continued in that business until 1862, either as partners under the name of "Rogers Brothers," or

Meriden Britannia Company v. Parker.

in connection with certain joints-took corporations, which they, or some of them, were instrumental in organizing; the principal of which were the "Rogers Brothers Manufacturing Company," and "Rogers, Smith & Company," of Hartford, and Rogers & Brother," of Waterbury. The goods produced by them were of a superior quality, and acquired a good reputation in market. In 1862, they, and said corporations, except the corporation of "Rogers & Brother," of Waterbury, had ceased to do business. On the 7th of November, 1862, they made a contract with the petitioners, by which, and by subsequent contracts, the petitioners acquired the right, which they now have, to manufacture and sell plated spoons and forks with the name "Rogers" stamped thereon as a component part of a trade-mark. They also became entitled to have, and did in fact have, the benefit of the skill and experience of the three brothers in that department of their business. They adopted, and now use, as their trade-mark, the words and figures, "1847, Rogers Bros. A 1," which differs somewhat from the trade-marks previously used by the Rogers brothers or the corporations organized by them. The petitioners have not only preserved the reputation which the Rogers goods had in market, but they have materially improved and extended that reputation; so that, to some extent, they have a valuable interest in their trade-mark, in addition to the interest, if any, originally acquired by contract. The Waterbury corporation still exists, and is doing a large business. They adopted as their trade-marks, which are still in use, "Rogers & Brother, A 1," and "Rogers & Bro., A 1." The petitioners now own a large majority of the stock in that corporation, and are themselves carrying on business, to some extent, in New Haven, in the name of "Rogers, Smith & Company," under the supervision of one George W. Smith. Since March 16, 1868, all the business done in this line by the Rogers brothers, or any one of them, has been for, or in connection with, the petitioners.

It was understood by wholesale dealers generally that goods stamped with the petitioners' trade-mark were manufactured by the petitioners, under the superintendence of the Rogers brothers, while consumers generally understood that the Rogers brothers were themselves the manufacturers. Such understanding on the part of the consumers was induced in part by the trade-mark, and in part by circulars, bill-heads, correspondence, etc. The petitioners adopted

and used the trade-mark by the consent of the Rogers brothers, and no person or corporation has ever questioned their right so to do.

In November, 1866, three brothers of another family, Cephas B. Rogers, Gilbert Rogers and Wilbur F. Rogers, who were then engaged in manufacturing coffin trimmings under the partnership name of "C. Rogers & Brothers," made an arrangement with the respondent, whereby he agreed to manufacture for them plated spoons and forks, stamped "C. Rogers & Bros." or "C. Rogers Bros. A 1." The petitioners did not consent to the use of these stamps. In March, 1871, by a further arrangement between the same parties, the respondent was authorized also to manufacture plated spoons and forks on his own account, bearing the stamp "C. Rogers & Brothers" or "C. Rogers' Brothers." The goods manufactured under this arrangement were in fact stamped "C. Rogers' Bros. A 1" until about the 1st of February, 1872, since which time they have been stamped "C. Rogers & Bros., A 1." These stamps, as the committee expressly finds, "resemble the petitioners' trade-mark, '1847, Rogers Bros., A 1,' to that degree that they are calculated to deceive, and do deceive, unwary purchasers, and those who buy such goods hastily, and with but little examination of the trade-mark; and induce such traders to believe, and they do believe, that the spoons and forks sold by the respondent, bearing such stamps, are manufactured by the same parties that manufacture spoons and forks bearing the stamps, '1847, Rogers Bros., A 1;' but purchasers who read the entire trade-mark on the respondent's goods, and who know the petitioners' trade-mark, cannot be deceived, nor can they mistake the respondent's goods for those of the petitioners." * * * "Large quantities of the respondent's spoons and forks have been sold by him upon the reputation of goods bearing such trade-marks, to wit, 'Rogers Bros., A 1;' 'Rogers & Bros., A 1,' and '1847, Rogers Bros., A 1.'"

These are the principal and most important facts. There are other facts, material to some extent, which will be noticed in their proper connection.

Two questions arise in this case: 1. Have the petitioners a right to protection in the use of the stamp, "1847, Rogers Bros., A 1," as a trade-mark? 2. Is the respondent violating that right?

1. The respondent contends that the petitioners are not entitled to protection in the use of their trade-mark on several grounds. The first is, that the name, "Rogers Brothers," cannot lawfully be

Meriden Britannia Company v. Parker.

used by the petitioners as a trade-mark, for the reason that long before the petitioners commenced to stamp their goods with that name, it had been appropriated by other manufacturers for that purpose, and it was then well known in the market as a brand for the goods of manufacturers other than the petitioners.

It is necessary to observe that the trade-mark, in the use of which the petitioners claim protection, is not Rogers Brothers," but "Rogers Bros.," with the figures "1847" prefixed, and the letter and figure "A 1" annexed. The combination constitutes the trade-mark. The mere fact that the name, "Rogers Brothers," had been previously used by other persons and corporations cannot, of itself, operate to prevent the petitioners from acquiring a right to the use of the same name as a part of their trade-mark. All the corporations which had a right to use that name had ceased to exist on the 7th day of November, 1862. The corporation of "Rogers & Brother," of Waterbury, were stamping goods, "Rogers & Brother, A 1," and "Rogers & Bro., A 1," but such stamps differ from that of the petitioners, and the committee finds that the parties themselves regarded their respective stamps as independent trade-marks.

The reputation which attached to the Rogers goods had its origin in the skill, taste and judgment of the three brothers. They had a right, superior to all others, to avail themselves of that reputation. Although they had, in certain instances, imparted to certain corporations the right to use their name, yet, in every instance, that right was connected with their own services and profits. Every such corporation, except the Waterbury company, had lost or surrendered that right, by ceasing to manufacture goods. The right to the use of their own name, therefore, must revert to the Rogers brothers, or we must practically deprive them, and, in some measure, the public, of all future advantage to be derived from their superior skill and industry. Policy, as well as the dictates of reason and justice, require the former. The fallacy in the argument of the counsel for the respondent seems to be this: they assume that the petitioners' trade-mark is identical with a trade-mark adopted and used by the several partnerships and corporations preceding them. But it is not a case of a continuing trade-mark, used by successive partnerships and corporations. It is rather a question relating to the right of parties to the use of their own name as a component part of several trade-marks, used respectively by

Meriden Britannia Company v. Parker.

partnerships and corporations with which they are connected. Viewed in that light, we see no difficulty in allowing these parties to use their own names freely, except as their right to do so is limited by their obligations to the Waterbury company. That corporation only acquired the right from two of the brothers to use the name "Rogers & Brother," and "Rogers & Bro." That right continues and is entitled to protection as against the parties from whom it was acquired, and others claiming under them. But they do not complain; on the contrary, the circumstances are such that both they and the petitioners are satisfied; and we do not see that the respondent has any cause of complaint, or right to derive any advantage from the fact that the trade-marks of the two parties resemble each other. We are satisfied, therefore, that the Messrs. Rogers had, as against the respondents, a right to the use of their own names, and might, under certain legal restrictions, impart that right to the petitioners.

It is not denied that the parties have attempted to do so, and have in fact done so by their several contracts, so far as it may be lawfully done. And that brings us to the next objection interposed by the respondent, which is, that this has not been done lawfully, for the reason that the name, as used by the petitioners in their trade-mark, does not indicate the true origin of the goods, and that it untruthfully represents that the Rogers brothers manufacture the goods.

The principle of law underlying this objection is fully conceded; and that is, that courts of equity will not protect a trade-mark which deceives the public. We do not suppose, however, that that deception need be of such a character as to work a positive injury to purchasers, nor, on the other hand, that every erroneous impression which the public or a portion of the public may receive, will be sufficient to destroy the validity of the trade-mark. The question then is, whether, in this case, the representation is of such a character as to defeat the petitioners' claim to protection.

The goods manufactured by the parties under their arrangement were manufactured under the personal superintendence of the Messrs. Rogers, or some of them, and were the product of their skill, experience and judgment. It is unnecessary to examine in detail all the evidence contained in the report tending to prove this proposition. The proposition itself is abundantly established.

The first contract between the parties provided that the goods

Meriden Britannia Company v. Parker.

should be of a given standard and quality; that the Messrs. Rogers should direct as to the manner of stamping the goods; should approve the weight, patterns, papers, boxes, labels, etc. and should devote their time and skill to the procuring of orders for the sale of the goods; that Simeon S. Rogers should superintend the weighing of spoons and forks before and after plating to determine whether they contained the required quantity of silver, and should devote his time, labor and skill in the business of cutting down, buffing, setting, papering, boxing and labeling goods. The contract in all these respects was complied with, and to that extent the goods were manufactured according to the mind and will of the Rogers brothers. It also appears that William Rogers superintended the alteration of the petitioners' dies (of which about fifteen hundred were in use), devised new patterns, and to a great extent remodeled the mechanical department of the petitioners' manufactory of spoons and forks, and had the general supervision of that department until the fall of the year 1865. He was then absent until March, 1868, when he returned and resumed and continued the oversight and general superintendence of that department as before, until in the winter of 1870-71, when he became incapable of doing so by reason of ill health. Since that time his son has performed, to some extent, the same duties. Asa H. and Simeon S. Rogers also have been employed most of the time in connection with this business. Now it distinctly appears that the goods placed upon the market under the several contracts between these parties, were not only quite up to the standard of the Rogers goods previously sold, but in some respects were superior in quality and style.

We have thus referred to details sufficiently perhaps to show conclusively that the public were in no sense defrauded by whatever representation the trade-mark contained, and that such representation, so far as it indicated that the Rogers brothers were the manufacturers of the goods in question, was, in an important sense, true. All that the public or the trade cared to know was, that the goods were the production of their skill and experience. That fact, as it seems to us, clearly appears. The further fact that the petitioners furnished capital and machinery, employed and paid laborers, and sold the goods, is entitled to but little weight so far as this question is concerned; although it shows that, in another sense, the petitioners were the

Meriden Britannia Company v. Parker.

manufacturers of the goods. We are satisfied that there is no such misrepresentation as the cases contemplate, which hold that a trade-mark which states a falsehood is not entitled to protection. If this were not enough to dispose of this objection, we might add that it does not clearly appear that the trade-mark in fact represented or caused any one to believe that the Rogers brothers were the manufacturers in any other sense than that just considered, which was, so far as we can judge, the same sense in which they had always been the manufacturers since 1853. Ever since then the name has been used in various forms, and generally in such a manner as to denote a partnership, while they were in fact but stockholders in corporations. Now, if we may suppose that the public were familiar with the history of this enterprise, and the various changes stated in the report, we shall have no difficulty in supposing that when the petitioners' trade-mark appeared, the name denoted what it had previously, that the goods were manufactured by some company or corporation with which the Rogers brothers were connected.

The other branch of this objection, that it did not indicate the true origin of the goods, refers mainly to the misrepresentation already considered. In other respects it has no particular force. Like all other symbols and devices used as trade-marks, its import was not at first perhaps fully understood. The effect, as well as the value, of a trade-mark, is the work of time and experience. This, probably, was no exception to the rule. However this may be, it seems to have been well understood by the trade at the date of this petition, that goods bearing that stamp were manufactured by the petitioners.

2. The next question is, whether the respondent, by the manner in which he carries on his business, interferes with and injures the business of the petitioners. On this question there is little room for doubt or argument. Under his present arrangement he commenced stamping goods, "C. Rogers Bros. A 1," but since February 1, 1872, he has stamped them, "C. Rogers & Bros. A 1." The committee finds that these stamps resemble the petitioners' trade-marks to such a degree that they are calculated to deceive, and do deceive, a class of purchasers, and that the respondent has sold large quantities of goods upon the reputation of goods bearing the stamps of the petitioners and of the Waterbury company. It is also found that the respondent had full knowledge of the reputa-

Meriden Britannia Company v. Parker.

tion of the Rogers goods, and that he supposed that the resemblance of his own to the petitioners' stamps would enable him more readily to sell his goods in the markets of the country. The fact that he supposed he had a legal right to do so will exonerate him from any intention to do his neighbor a legal wrong; but his mistake as to his legal rights does not lessen the injury to the petitioners. The fact that careful buyers, who scrutinize trade-marks closely, are not deceived, does not materially affect the question. It only shows that the injury is less, not that there is no injury. Another class of purchasers, to whom large quantities have been sold, are deceived. Such purchasers, perhaps, will have no reason to complain; as they, if they are injured by the deception, must attribute the injury to their own want of diligence. But the petitioners stand on entirely different ground. No amount of diligence on their part will guard against the injury. An injunction is their only adequate remedy, and to that we think they are entitled.

It only remains for us to consider the extent to which the remedy should be applied. The prayer of the petition is, that the respondent may be enjoined from using the stamp, "C. Rogers Bros. A 1," or any stamp of which the word "Rogers" or the words "Rogers Bros." shall form the whole or a part, and from selling goods so stamped, or stamped with any stamp so nearly resembling the petitioners' stamp, "1847, Rogers Bros. A 1," as to be likely to deceive purchasers. We think the petition should be granted so far as to restrain the use of the stamp specified, and also to restrain the use of the words "Rogers Bros." But the use of the name "Rogers" ought not to be prohibited. We cannot say that every use of that name will necessarily infringe upon the petitioners' trade-mark. If it may be so used as not to infringe, it would be manifestly unjust to forbid such use by the respondent, inasmuch as his title to the mere name is as good apparently as the petitioners'. Even if the use of the name should in some degree increase the respondent's sales, and thus, at least indirectly and remotely, injure the petitioners, it is an injury to which they must submit, unless there is such resemblance to the petitioners' stamps as to induce purchasers to believe that they are purchasing the petitioners' goods. The use of a prominent name in a trade-mark will necessarily give rise to some embarrassment of this character, and those so using it must be presumed to take the risk.

The respondent should also be enjoined from selling goods bear-

Meriden Britannia Company v. Parker.

ing such stamps which were manufactured since the service of the petition, or which may hereafter be manufactured. But we think it proper in the circumstance not to extend the injunction to goods which were already manufactured and stamped at the time the suit was brought, or which were in process of manufacture and so far advanced in the process as to be stamped. These goods may be sold to purchasers who will not be misled by the stamps, and an absolute prohibition of their sale might do some injustice to the respondent. Without, therefore, intending to concede his right to sell these goods so as to injure the petitioners, we think it proper in the circumstance not to prohibit the sale, but to leave the petitioners to their remedy at law for any injury that may be actually done by the sale.

The general prayer that the respondent be enjoined from selling goods stamped with a stamp so nearly resembling the petitioners' stamp that it is calculated to deceive, etc., is too vague and uncertain to be of any practical benefit if granted. The resemblance and deception are matters of fact to be determined in each case.

Boardman v. Meriden Britannia Company, 36 Conn. 207,

We advise the superior court to render judgment for the petitioners to the extent indicated above.

In this opinion the other judges concurred.

NOTE. — Under what circumstances one may be restrained from the use of his own name is a question of some difficulty, and one to which it is, perhaps, impossible to give a general answer.

It is an evident principle that one should not be allowed to assume the name of another in the same business, to the injury of the latter. And under certain circumstances the courts will even restrain a man from the use of his own name, as when in connection with it he wrongfully adopts the trade-mark or device of another of the same name in the same business, or is otherwise guilty of such affirmative fraudulent acts as are designed and will naturally have the effect to deceive the public, and induce them to suppose that the wares of the former are the manufacture of the latter.

The earliest case on this subject is *Sykes v. Sykes*, 3 B. & C. 541, A. D. 1841. The plaintiff carried on the business of a shot, belt and powder-flask manufacturer, and marked his goods "Sykes' Patent." His patent had been adjudged invalid. Defendants afterward commenced the manufacture of similar articles, and marked them "Sykes' Patent" without any pretense of having any patent. The stamp closely imitated the plaintiff's. The defendants were restrained from the use of the words "Sykes' Patent" and the imitative stamp. The next prominent case is *Croft v. Day*, 7 Beav. 84, A. D. 1844. A blacking manufactory had long been carried on under the firm name of Day & Martin, at 97 High Holborn. The executors of the survivors continued the business under the same name. A person by the name of Day, having obtained the authority of one Martin to use his name, set up the same trade at 90½ Holborn Hill, and sold blacking as of the manufacture of Day & Martin, 90½ Holborn Hill, in bottles and with labels having a general resemblance to those of the original firm. He was restrained by injunction. The master of the rolls said: "My decision does not depend on any

Meriden Britannia Company v. Parker.

particular or exclusive right the plaintiffs have to use the name of Day & Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit to himself, to which he is not in fair and honest dealing entitled. Such being my opinion, I must grant the injunction restraining the defendant from carrying on that deception. He has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name. I will not do any thing to debar him from the use of that name or any other name calculated to benefit himself in an honest way, but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself at the expense of the public an undue and improper advantage."

Rodgers v. Nowell, 5 M. G. & Scott, 109, A. D. 1847. The plaintiffs were cutlery manufacturers, and had caused to be impressed on their goods the figure of a crown with the letters V. and R. on either side, and beneath it the words "J. Rodgers & Sons." The defendants were cutlers in Sheffield, and had in their employ a man named William Rodgers whose father's name was John, and this William had two brothers in Sheffield who were also cutlers. Defendants employed William to manufacture knives similar in appearance to the plaintiffs', and with the same stamp, with only the addition of the word "Sheffield." The judge, at the trial, directed the jury that a manufacturer has a right of action against one who affixes to his own goods the known and accustomed mark of another, and sells them upon a representation that they are of the manufacture which such mark would denote them to be, but that, in order to justify a verdict for the plaintiffs, they must find that the defendants sold the goods as and for the plaintiffs' goods, with intent to deceive and defraud the plaintiffs. A verdict for plaintiffs was sustained.

Holloway v. Holloway, 18 Barb. 209, A. D. 1850. The plaintiff, Thomas Holloway, sold a medicine known as "Holloway's Pills." The defendant, Harry Holloway, commenced selling pills as "H. Holloway's Pills," put in boxes, etc., similar to the plaintiff's, and with a view of passing off his pills as the plaintiff's. An injunction was granted. The master of the rolls said: "The defendant's name being Holloway, he has a right to constitute himself a vendor of Holloway's pills and ointment, and I do not intend to say any thing tending to abridge such right. But he has no right to do so with such additions to his own name as to deceive the public, and make them believe he is selling the plaintiff's pills and ointment."

Burgess v. Burgess, 17 Eng. L. & E. 257, A. D. 1853. For more than forty years John Burgess, father of the parties, carried on business at No. 107 Strand, London. For the last twenty years of this period and until the father's death the plaintiff was in partnership with him. The chief article of their manufacture was a fish sauce which they called "Burgess' Essence of Anchovies," and that title was printed on their labels. The defendant was employed for many years on a salary by his father and brother in the business. In 1851 he set up business for himself at No. 36 King William street, and there made and sold a fish sauce of anchovies which he called "Burgess' Essence of Anchovies," and over his door he placed the sign, "W. H. Burgess, late of 107 Strand," and on each side of the door he put the sign, "Burgess' Fish Sauce Warehouse, late of 107 Strand." The vice-chancellor enjoined the use of the words, "late of 107 Strand," and "Burgess' Fish Sauce Warehouse," but refused to enjoin the use of the words "Burgess' Essence of Anchovies." This was affirmed on appeal, Lord Justice TURNER observing: "It is clear no man can have any right to represent his goods as those of another; but in all cases of this kind it must be made out that the defendant is selling his goods as those of another. When a person is selling his goods under his own name, and another person not having that name is using it, it is clear that he is so using it to represent the goods sold by himself as those of another; but where the two persons have the same name, it does not follow that, because the defendant sells goods under his own name, and it happens that the plaintiff has the same name, he is selling goods as the goods of the plaintiff."

Clark v. Clark, 25 Barb. 79, A. D. 1857. An injunction had been granted restraining the defendants from using a certain device previously adopted by plaintiff to designate spool cotton. The plaintiff's device contained the name "Clark & Co." The defend-

Meriden Britannia Company v. Parker.

ants' was just like it except the name of "J. Clark, Jr., & Co." The injunction restrained the defendants from using their name as well as the device, but in this respect it was removed. The defendants' right to make and sell thread in their own name was conceded, but they were ordered to express it so as not to appear to imitate the plaintiffs. The court said: "There will still be a similarity between the labels of the two that may mislead some. But this results from two persons of nearly the same name being in the same business, and the undoubted right of each to use his own name, and to describe the article which he sells by its well-known name, but does not result from an imitation of the mark of the others."

Faber v. Faber, 49 Barb. 357, A. D. 1867. Motion to continue injunction restraining defendant from using the name Faber as a trade-mark on pencils. The court remark: "It is unfortunate for the plaintiff that he and the defendant J. H. Faber are both manufacturers of lead pencils at and near the same place in Germany, and they both have the same name Faber, for it is easy to see that this circumstance may have been and may be an injury to the plaintiff; but the defendant Faber has a right to put or stamp his own name in gold, gilt or other letters on his pencils, and on the bands, wrappers or covers in which they are put up, as described in the complaint. And any injury which the plaintiff has suffered or may suffer by such use of the defendant's name merely, must be viewed as an injury without remedy." "The maker had the right to put his own name on his own pencils."

Schweitzer v. Atkins, 46 L. J. R. (37 N. S.) Ch'y, 780, A. D. 1868. Plaintiff sold a preparation of cocoa labeled "Schweitzer's Coccatina." Defendant, who had been in his employ, set up business with a man also named Schweitzer, on money furnished by plaintiff, and sold a similar preparation of cocoa, labeled "Schweitzer, Atkins & Co.'s Coccatina." *Held*, a fraudulent imitation, and enjoined. *Burgess v. Burgess* was pronounced "undoubtedly the rule of the court," "but in that case," say the court "there was a distinctive label."

James v. James, L. R., 13 Eq. Cas. 421, A. D. 1872. Previous to 1833 Robert James, a Lieutenant in the army, invented an ointment for horses, which became widely known as "Lieutenant James' Horse Blisters." It was never patented. He died in 1865, but previously granted his invention, and the exclusive right of signing his name on labels, to the plaintiffs. The defendant, Robert Joseph James, a son of one of the plaintiffs, had been employed by him in the manufacture, and thus became acquainted with the secret, and in 1867 began to manufacture an ointment and sell it as "Lieut. James' Horse Blisters." About the same time he dropped his second name of Joseph, and put his name Robert James on his pots of ointment. These pots, in every particular, and the directions for use, were almost precisely like those of the plaintiffs, but had a horse's head on the label. Defendant's advertisement described the preparation as "Lieut. James' Horse Blisters, manufactured by Robert James, the grandson of the inventor, and made by him for several years for Lieutenant James," and cautioned the public against a spurious imitation, and declared that none were genuine without the horse's head and the signature Robert James. Defendant also copied testimonials given to the original discoverer. The court *held*, that defendant might manufacture the blisters and sell it as the invention of Lieut. James, but must use his whole name and desist from saying that none is genuine without the horse's head and the signature Robert James, and from asserting or suggesting that plaintiffs' preparation is spurious.

Wolfe v. Burke, 7 Lans. 151, A. D. 1873. The plaintiffs made gin labeled "Hudson G. Wolfe's Bell Schnapps." Defendants were proprietors of an article known as "Udolpho Wolfe's Aromatic Schiedam Schnapps." The action was brought to restrain defendants from interfering with plaintiffs' trade through threatening circulars issued to the latter's customers, and also to prevent the defendants from restraining the plaintiffs' sale by injunction. The plaintiffs had judgment, and the court observed: "The plaintiffs have the right to use the name of Wolfe, because it is a part of their firm name, and is the surname of the head of the firm. A man cannot make a trade-mark of his name to the exclusion of a like use of it by another who bears the same name, if the use by the latter is fair and unaccompanied by any contrivance to deceive." "No doubt the use of the words 'Wolfe' and 'Schnapps' has facilitated competition with

Meriden Britannia Company v. Parker.

the defendants, but, for the reason stated, such competition cannot legally be deemed fraudulent or unfair." This case has been reversed recently in the court of appeals, but the above doctrine was not dissented from. The reversal was mainly on the ground that, as schnapps was nothing but gin, and both parties were trying to deceive the public, there was nothing commending itself to the protection of a court of equity, and the court did not care a snap for either party.

The latest case that has come to our notice is that of *Meneely v. Meneely*, 3 N. Y. Sup. 540, being a decision of the general term of the supreme court.

Plaintiffs, who were two brothers, carried on business at West Troy, Albany county, as bell founders, under the name of "E. A. & G. R. Meneely." This business had been established by the father of plaintiffs, who had acquired an extended reputation of great value as a manufacturer of bells, and which had, by his last will, been given to plaintiffs. Defendants, one of whom was a brother of the plaintiffs, after the father's death, began the manufacture of bells under the name of Meneely & Kimberly, at Troy, Rensselaer county. In an action to restrain defendants from the use of the name of "Meneely" in the bell business, *held*, that equity would not interfere to prevent defendant Meneely from the use of his own name in such business, no fraud or intention to injure plaintiffs or deceive the public being shown, even though he intended to derive advantage from such name; (2) that there was no such a resemblance in the names of the firms as would of itself tend to deceive the public or indicate a fraudulent purpose; (3) that the location of defendant's business was not of itself evidence of an attempt to deceive the public, or an interference with plaintiff's business.

Defendant Meneely, by the same will through which the plaintiffs obtained the business and its good will, was given a bequest, which he accepted. *Held*, that he was not thereby precluded from the use of his name in the business of bell founding.

MILLER, P. J., who delivered the opinion of the court, said: "I am inclined to think that in this respect he committed no wrong, and that he had a perfect right to use his own name in his own business, even although that name was the same as the one used by the plaintiffs, and the business precisely of the same character. It would, it seems to me, be extremely inequitable to allow some members of a family to deprive others of the rights acquired by a common inheritance, and to say that the family name should not be employed by one because it might interfere with others—in other words, to deprive a man of the right to earn a livelihood in the name of his father and in the pursuit of the only business which that father had been engaged in, or the son had been instructed to follow.

"The law does not sanction any such injustice, and so far as I have been able to discover, none of the reported cases go to the extent of holding that a court of equity will interfere to prevent the use of a family name in the pursuit of a lawful business under circumstances similar to those which are presented in the case at bar. In most cases, and I am inclined to think that there is no exception to this rule, the power of the court has only been interposed where there has been fraud or deceit practiced, or where some false or fraudulent device has been employed to injure and interfere with the business of another and to impose upon the public. A brief reference to some of the leading cases which are relied upon will, I think, sustain this view."

There are several interesting French cases cited in Brown on Trade-marks. The principle of all of them is thus expressed in one: "Every person has a right to use his patronymic in commerce as in any thing else, subject, however, to being distinguished as much as possible from any other in the same trade."

This author also remarks: "The rule is, that a man cannot turn his name into a trade-mark. Any other rule would lead to most absurd consequences. There are several *dicta* the other way, but they must be attributed to a loose habit of speech, or a want of acquaintance with the indispensable requisites of the technical mark."

"John Jones cannot claim the right to an exclusive use of his mere name to mark his merchandise, consisting of boots and shoes; for any other person of the same name dealing in the same class of merchandise has as good a right to so mark his goods. But if one form his name into an anagram, or form a cross or crescent, or any other fancy figure of his name, then, by the singularity of formation, it acquires an individuality, and ceases to be merely his name and becomes a lawful mark."

We believe we have cited every case in point on the question. There are several cases in which corporations have been the parties sought to be restrained, which of course stand on a different footing from natural persons, for the persons forming a new corporation designated like another corporation already formed in the same business, are chargeable with assuming a name that does not belong to them. In one of these cases the element of fraud or falsehood entered (*Batchellors v. Batchelor Manufacturing Co. and others*, not reported, in Vermont), and in the other the element of estoppel by contract (*Holmes and others v. Holmes, etc., Manufacturing Co.*, 81 Conn. 378; 9 Am. Rep. 324); but in neither of these cases was any thing said or adjudged in conflict with the general doctrine in the cases of individuals which we have cited. In *Newby v. Oregon Central Railway Co.*, 1 Deady, 609, a corporate name was held to be a trade-mark, and the defendants were enjoined from using the name "The Oregon Central Railway Co.," there being a prior corporation having that name.

It seems to us that confusion has sometimes arisen from a failure to distinguish between infringements upon a trade-mark and mere competition in trade. In our view, such cases as the *Faber* and *Meneely* cases are not trade-mark cases in any sense, but simply cases of alleged unfair competition in trade. In the case of imitation of a trade-mark, the proprietor will be protected whether the imitation be fraudulent or innocent. The damage to him is the same in either event. But in the case of alleged unfair competition in trade, the fraudulent intent must be conclusively shown. It is not enough that the public are deceived or liable to be deceived; the court must be satisfied that the deception is contrived and intended before it will punish a man for causing it.

We think we are warranted in deriving this conclusion from these cases: A man has a right to the free and unrestricted use of his own name in trade or manufacture, notwithstanding another of the same name may have previously set up the same business in the same locality, and acquired a celebrity for his goods, unless the former in connection with his own name uses some mark or device which has become the property of the latter, or is otherwise guilty of affirmative acts designed to deceive the public and induce them to believe that the goods of the former are the goods of the latter, and in such cases the use of such mark or device or the practice of such acts will be restrained, but not the use of the name.—*RAP.*

BUELL V. FLOWERS.

(39 Conn. 468.)

Satisfaction — payment of debt after service of writ.

After the service of a writ, but before the session of the court, defendant paid the debt, which plaintiff received in full of the debt; but no costs were paid, though demanded by the plaintiff. *Held*, that the plaintiff could not afterward proceed for nominal damages and costs.

ASSUMPSIT on a promissory note. The defendant pleaded the general issue with notice that he would give in evidence that after the debt sued on became due, and after the commencement of the suit, the defendant paid the plaintiff the full amount of the debt, principal and interest, and that the same was accepted by the plaintiff.

Buell v. Flowers.

The court found the following facts : The plaintiff was at the time of the commencement of the action the equitable and *bona fide* owner of the note described in his declaration. He was also the assignee of a certain mortgage given by the defendant to secure the note, and simultaneously with the present action brought an action of ejectment for the land mortgaged and a bill of foreclosure, all three suits being against the defendant and returnable to the same court. It was proved by evidence introduced by the defendant, without objection from the plaintiff, that on December 19, 1871, the first day of the term, shortly before the opening of the court, the defendant's attorney paid to the plaintiff's attorney the costs of the ejectment and foreclosure suits, and the amount due on the note, taking the following receipt, which was signed by the plaintiff's attorney : "New Haven, December 19, 1871. Received of Artemas Flower \$573.16 in full of principal and interest to date on note for \$500 of A. Flower to S. H. Scranton, dated July 11th, 1868, assigned to J. S. Buell ; also \$11.67 costs of an action for a foreclosure, and \$8.89 costs of an action of ejectment, brought on a mortgage given to secure said note to the Superior Court, New Haven County, December term, 1871 ; which actions are to be *no app'd.*" Payment of the costs of the present action was requested and refused. The note was retained by the plaintiff's attorney, and is still in his possession. The plaintiff claimed that he was entitled to a judgment for nominal damages and costs, and the question as to what judgment should be rendered was reserved for the advice of this court.

Baldwin, for plaintiff.

R. D. Smith, for defendant.

PARK, J. The plaintiff contends that the special matter of defense set forth in the defendant's notice under the general issue could not be given in evidence in that state of the pleading, but that it was necessary for the defendant to plead it specially in bar of the further prosecution of the suit, inasmuch as it is matter that had arisen since the suit was brought ; that the issue between the parties raises the question whether, at the time the suit was commenced, the plaintiff had a good cause of action, and that, therefore, matter which may have subsequently arisen does not

tend to disprove the issue. This may be true in theory, but we think that since the statute of 1848, a notice under the general issue has all the force of a special plea and supplies its place.

The statute declares that the defendant may give in evidence, under the general issue, any special matter of defense, according to the nature of the action, but that he shall not give in evidence any defense consistent with the truth of the material allegations of the declaration, unless at the time of pleading he shall file notice thereof in writing. Under such issue the statute seems to authorize the admission of any defense which may exist to the merits of the case, provided the defendant gives notice of the same in writing at the time of pleading. He does not seem to be confined to matters of defense existing at the time the suit was brought, and no good reason can be given why he should be. The plaintiff in this case was as much apprised of the grounds of defense by the notice that was given, as he possibly could have been by a special plea in bar to the further maintenance of the suit; and why should he complain? He does not pretend that any advantage has been taken of him, or could have been taken, but stands on the merest technicality. We think in these days of judicial progress, such technicalities must give place to sounder principles, unless some good reason can be given for adhering to them, which we fail to see in the case at bar. The recent case of *Ayer v. Ashmead*, 31 Conn. 447, assumes that notice under the general issue is a proper mode of procedure in a case like the one under consideration. We think, therefore, there is nothing in this objection.

The remaining question in the case is clearly governed by the case of *Ayer v. Ashmead*, just referred to, and that of *Canfield v. The Eleventh School District*, 19 Conn. 529. Those cases expressly decide that costs in the progress of a case in court are incidental to the debt or damages sought to be recovered; and that if the debt or damages are paid to the plaintiff, and accepted by him to his full satisfaction, so that there can be no further claim for any portion of the debt or damages as such, the costs which may have been made in the prosecution of the suit cannot be afterward recovered by the plaintiff. The principle of these cases appears to be sound, and applies to the case at bar. It is not pretended that the costs in controversy in this case are an independent claim against the defendant, but it is conceded that it is necessary for the plaintiff to recover judgment of some amount as debt or damage

Buell v. Flowers.

before there can be a recovery of the costs that have been made. But the debt has been paid, and the payment has been voluntarily accepted in full satisfaction of all that is due the plaintiff as a debt, and on what principle can he be entitled to recover something more as debt or damages? The voluntary acceptance of money in full payment of the debt operates as a discharge of the debt, and consequently as a discharge of the cost incident to the debt which otherwise he would have been entitled to recover. The tender of the debt by the defendant without a tender of the costs that had been made, would not have had this effect. It is the voluntary acceptance of the money as a full payment of the debt, that operates to discharge the costs, which until judgment are only an incident of the debt.

A majority of the court are of opinion that the plaintiff himself has put it out of his power to recover the costs in controversy, and, therefore, advise the superior court to render judgment for the defendant.

In this opinion CARPENTER and FOSTER, JJ., concurred. SEYMOUR, J., dissented on the last point.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

DEWEY, plaintiff in error, v. McLAIN.

(7 Kans. 122.)

Confiscation act—Limitation of actions.

Land was seized, confiscated and sold under the Act of Congress of July 17, 1862, providing for the seizure and confiscation of "the property of rebels." *Held*, that only the life estate was seized and sold, and that a State statute limiting the right of action in such cases would not bar the right of the reversioner to recover possession of such land after the termination of the life estate.

EJECTMENT by William McLain for one hundred and sixty acres of land. The court found the following facts:

On the 9th day of June, 1863, Levi McLain was the owner in fee-simple of the land in controversy. On that day a decree was duly entered in the United States district court, confiscating, condemning and forfeiting said land to the United States, under the provisions of the act of congress of July 17, 1862. In the warrant of seizure, libel of information, and decree, said Levi McLain was alleged to be the owner. Eleven days thereafter, and on June 20, 1863, said McLain died in the Confederate service, leaving plaintiff as sole heir. On December 4, 1863, a writ of *venditionis exponas* was issued, and by virtue thereof said land was sold to D.

Dewey v. McLain.

A. Dewey, the defendant. The sale was confirmed April 13, 1864. The marshal executed a deed to defendant April 22, 1864, who immediately took possession and has held it ever since. The plaintiff, William McLain, is aged about thirteen years, and is the son and only heir at law of said Levi McLain.

The defendant, in his answer, and at the trial, alleged that the claim of the plaintiff was barred by the limitation law of February 20, 1864. This act is as follows:

"SECTION 1. In all cases where property, real or personal, or moneys or choses in action, secured by mortgage or unsecured, are or have been seized and confiscated by process of law, under the act of congress entitled 'An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,' approved July 17, 1862, or any amendment thereto, all persons owning or claiming to own such property, moneys or choses in action, or to have any right, title or estate therein, at or before the time the same was so seized under such act of congress, and their assigns and legal representatives shall be forever barred from instituting suit in any court in this State, setting up or claiming any right in the same, as against the judicial decree of condemnation thereof, or when the same is in the hands of any purchaser or sub-purchaser under said judicial decree, unless said suit shall be instituted within the following periods, to wit: As to all such property, moneys, choses in action heretofore seized and judicially condemned, the time limited for the institution of such suit shall be six months after the taking effect of this act, and not thereafter; and as to all property, moneys, or choses in action hereafter so seized and judicially condemned, the time limited for the institution of such suit shall be six months after such decree of condemnation shall have been rendered, and not thereafter." Laws of 1864, p. 154; Gen. Stat., p. 550.

The district court held that the action was not barred, and upon the facts found gave judgment for the plaintiff for the recovery of the land. The defendant brought petition in error for review.

Clough & Wheat, for plaintiff in error.

C. K. Gilchrist, for defendant in error.

BREWER, J. [after deciding a question of practice.] The other and graver question is this: Is the claim of the plaintiff barred?

Dewey v. McLain.

the limitation law of February 20, 1864? The confiscation proceedings, under the law of congress approved July 17, 1862 (ch. 195, acts of second session, 37th congress, p. 313, and explanatory joint resolution, p. 361), reach only the *life estate*. This is settled by the decision of the supreme court of the United States (*Bigelow v. Forrest*, 9 Wall. 339), and being a construction of a statute of the United States, we follow that decision. The decree of June 9, 1863, therefore, divested Levi McLain of his life estate, and vested the same in the United States. That life estate was all the United States had to sell; all, we must presume, as we have not the writ before us, it attempted to sell, and all that Dewey could or did purchase. True, he purchased after the life estate had in fact terminated; but his purchase relates back to the decree; he bought what that ordered sold; he took possession under that. Obtaining possession through a sale under that decree, his rights are determined thereby. Entering into possession, then, as the claimant of a life estate, his possession was not adverse to, but consistent with and in subordination to the rights of the reversioner. Will such a possession set a statute of limitations to running? Ordinarily not. In the case of *Kirk v. Smith*, 9 Wheat. 241, MARSHALL, C. J., says one of the rules applicable to limitation laws "which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is, that possession, to give title, must be adversary — the word, indeed, is not to be found in the statutes, but the plainest dictates of common justice require that it should be employed." "It would shock that sense of right which must be felt equally by legislators and judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title. Several cases have been decided in this court in which the principle seems to have been considered as generally acknowledged, and in the State of Pennsylvania particularly it has been expressly recognized. To allow a different construction would be to make a statute of limitations a statute for the encouragement of fraud — a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such a construction."

In the case of *Ziller v. Eckhart*, 4 How. 389, the supreme court of the United States says, that where "possession was *originally* taken and held in subserviency to the title of the real owner, a clear, positive, and continued disclaimer and disavowal of the title, and

Dewey v. McLain.

assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute, otherwise the grossest injustice might be practiced; for, without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations."

The supreme court of Illinois, in the case of *Turner v. Chamberlin*, 15 Ill. 273, says: "To constitute an adverse possession sufficient to defeat the right of action of the party who has the legal title, the possession must be *hostile in its inception*, and so continue without interruption for the period of twenty years. It must be an actual, visible and exclusive possession, *acquired and retained under the claim of title inconsistent with that of the true owner*."

In *Smith v. Burtis*, 9 Johns. 180, the court says: "The possession for ever so long a time, stripped of the circumstance that it is unaccompanied with the claim of the *entire title*, will not amount to an adverse possession, barring those who have the real and legitimate title."

In *Jackson v. Parker*, 3 Johns. Cases, 124, the court says: "An entry adverse to the lawful possessor is not to be presumed. It must appear by proof." * * * "The statute of limitations could not begin to run until the possession of the defendant was *avowedly* held in opposition to the right of the heirs."

But plaintiff in error claims that this being a proceeding *in rem*, the decree starts the statute above quoted, that "the time limited for the institution of such suit shall be six months after such decree of condemnation shall have been rendered, and not thereafter." But against a claim to what, does the running of the statute create a bar? Obviously, where by the lapse of time from a decree a party is barred from asserting a claim, it should be simply a claim to that taken by the decree. Here all taken by the decree was a life estate. A fair and natural construction of the statute would be, that the six-months' limitation only barred a claim to that life estate, or some interest therein. The language is this: "All persons owning or claiming to own such property, money, or choses in action, or to have any right, title, or estate therein, and their assigns and legal representatives * * * shall be forever barred from * * * setting up or claiming any right in the same." The reversioner does not "own" the life estate.

has no "right, title, or estate" therein. He does not, in this action, set up or claim any right in the life estate. He is seeking to enforce his right, as reversioner, to the possession — a right which did not commence till after the termination of the life estate, till every interest seized or affected by the decree was at an end. If he were seeking to recover the rents and profits which accrued during the life estate, the bar of the statute might be good. Any other construction would, except in cases where the party against whose property the proceedings were had died within six months after the decree, operate to deprive the reversioner of his estate without his day in court, and would therefore be unconstitutional. He could not bring suit to set aside the decree during those six months, because his title is not affected by that decree; nor to recover the possession of the land, for he has no right to the possession till the termination of the life estate. Thus, during the six months he would have no rights to present, and after the six months his rights would be barred by the statute. That would in effect deprive him of his reversion, without ever having a day in court. This transcends the power of the legislature; and if the act required this construction it would be as to such a party unconstitutional and void. But the construction we have indicated above, as the fair and natural one, obviates this difficulty. The legislature, aware that only the life estate could be taken in such proceedings, determined that whoever contested for that life estate as against the decree should do it speedily. This justifies the reasonableness of the time given by the statute, only six months, as well as the absence of all exceptions on account of minority or other disability. A person buying at a confiscation sale, bought the life estate, and unless such interest was questioned within six months from the decree, his title thereto became absolute, and he was, during the existence of such life estate, entitled to the possession and all the benefits thereof. But when the life estate terminated, if he would claim as against the reversioner the protection of the limitation laws, it must be by an *adverse* possession, continued for the length of time prescribed by the ordinary limitation laws. The language of Judge STRONG in the case of *Bigelow v. Forrest*, hereinbefore cited, though not based upon the same question as here presented, is nevertheless forcible in its application to it. He says: "Was he therefore barred from maintaining the ejectment? The land was not seized or condemned for any act of his. He had no interest in it when it

Prell v. McDonald.

was declared forfeited. He could not have been heard in opposition to the decree of forfeiture. That proceeding was wholly *inter alias partes*. If, therefore, he is not at liberty to assert his claim, he is denied the right to his property without trial, without any procedure in due course of law, and the practical effect of the bar is to assure to the purchaser at the marshal's sale the enjoyment of the property after his right has expired, and to give him by estoppel a greater estate than he purchased. No construction of the act of congress that works such results can be accepted." For these reasons the judgment must be affirmed.

All the justices concurring.

PRELL V. McDONALD.

(7 Kan. 423.)

Municipal corporations — courts take judicial notice of acts creating.

Acts creating municipal corporations are public acts, of which courts will take notice without proof.

ACTION for false imprisonment by Lewis Prell against McDonald, mayor, and Files, deputy marshal, of the city of Fort Scott. Justification under an ordinance of said city. There was no evidence that Fort Scott had ever been incorporated as a city; but the court held that it could take judicial notice of the acts of incorporation of said city. The jury returned a verdict for the defendants, and plaintiff brought error.

M. V. Voss, for plaintiff in error.

W. C. Webb, for defendant in error.

VALENTINE, J. [after deciding a local question]. It is claimed that the plaintiff violated a certain city ordinance. This was an ordinance "to preserve the peace, order and quiet of the city of Fort Scott," and seems to have been adopted February 16, 1861.

Had the city of Fort Scott any legal corporate existence at that time? The acts of 1855 (chap. 40, p. 812) and of 1860 (Private, chap. 54, p. 114), providing for the incorporation of the town of Fort Scott, were neither pleaded nor proved by the defendants. Are these acts of such a public nature that the courts will judicially take notice of them without proof of their existence? We think they are. *New Portland v. New Vineyard*, 16 Me. 69, 70; *Gorham v. Springfield*, 21 id. 58, 60; *State ex rel. v. Lean*, 9 Wis. 284, 295. Towns and cities are not private corporations; they are public corporations, created for the purpose of governing a portion of the people of the State who may reside within their boundaries, or may casually be there, or have property there. In chartering such corporations the State in one sense charters a portion of itself. Such corporations are simply instruments in the hands of the State, made use of for the better protection of rights, the administration of justice, and the enforcement of the laws. All their powers must be exercised for the general good of the community, and not for any selfish or private purpose. Laws creating such corporations, we hardly think, are private laws. We think there was sufficient evidence that the people of Fort Scott organized as a corporation under these laws. But even in the absence of any evidence to the contrary, we think it ought to be presumed that they did so organize. The evidence of the existence of said ordinance was sufficient. Comp. Laws of 1862, p. 108, § 11; Gen. Stat., p. 701, § 379. The ordinance was read from the "book of ordinances" of said city. We think it was unnecessary to go into the proof of all the preliminary steps in passing and publishing said ordinance. The book itself of ordinances was *prima facie* evidence of the validity of the ordinance. If any thing essential to its validity was omitted in passing or in publishing it, it then devolved upon the plaintiff to show such invalidity.

[Several unimportant questions as to the legality of the proceedings of the mayor and deputy marshal were then decided, and the judgment reversed for errors in relation thereto.]

COMMISSIONERS OF LEAVENWORTH COUNTY v. MILLER.

(7 Kans. 479.)

Constitutional law — power of legislature to authorize municipal aid to railroads.

A State legislature has the constitutional power to authorize counties and municipal corporations to subscribe for stock in railroad companies, and to issue bonds in payment therefor.

A State constitution provided that "the State shall never be a party in carrying on any work of internal improvement." *Held*, not to be a restriction on municipal corporations.

Legislative power defined. (*See note*, p. 465.)

ACTION by Miller, the defendant in error, to recover of the plaintiff in error, a sum of money claimed to be due upon a certain bond of said county. This bond was issued under chapter 12 of the Laws of 1865, entitled "An act to authorize counties and cities to issue bonds to railroad companies," which was approved February 10, and took effect February 14, 1865. Section 1 of said chapter provided "That the board of county commissioners of any county, to, into, through, from, or near which, whether in this or any other State, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation, in the name and for the benefit of said county, not exceeding in amount the sum of \$300,000 in any one corporation, and may issue the bonds of such county, in amounts as they may deem best, in payment for said stock. * * * But no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county at some general election, or some special election," etc. Laws of 1865, p. 41. The board of commissioners of Leavenworth county called a special election to be held June 30, 1865, to determine by vote of the qualified electors of said county whether said board of county commissioners should subscribe \$250,000 to the capital stock of the "Union Pacific Railway Company, Eastern Division," and issue the bonds of the county in payment for said stock. The notice of the election stated the question submitted to the electors to be "whether the commissioners should issue \$250,000 in bonds, to be expended in the stock of said railway company." The proposition having received a majority of all the votes cast at said special election, the county commissioners, on the 1st of August,

Commissioners of Leavenworth County v. Miller.

1865, made the subscription and issued the bonds. Series "A" of the bonds so issued, fell due in March, 1867. One of these bonds, of the denomination of \$250, was assigned to Edward Miller, defendant in error, who presented it, after maturity, to the treasurer of Leavenworth county, and demanded payment, which was refused; he also presented it to the board of county commissioners, and demanded payment, but was refused. The county board had, at an earlier period, made an order directing the treasurer not to pay any of said bonds. Miller brought suit against The Board of County Commissioners of the County of Leavenworth, to recover the principal and interest due on his said bond. The case was tried at the November term, 1868, of the district court, when the plaintiff had judgment for \$288.80. From this judgment The Board of County Commissioners appeal, by petition in error.

Thomas P. Fenlon, for plaintiff in error.

E. Stillings and *T. A. Hurd*, for defendant in error.

VALENTINE, J. This action was commenced by the defendant in error, in the court below, to recover from the county of Leavenworth a sum of money claimed to be due upon a certain bond of said county. This bond is for the sum of \$250, and is one of a series of bonds amounting in the aggregate to the sum of \$250,000, issued by said county to the Union Pacific Railway Company, E. D., in payment for a like amount of the capital stock of said company. This bond was issued August 1, 1865, under an act of the legislature authorizing counties to subscribe to the capital stock of railroad companies, and to issue bonds in payment therefor, approved February 10, 1865. Laws of 1865, p. 41. And the principal question in this case is, whether the legislature had the constitutional authority to pass said act.

This case was submitted to this court with but very little argument concerning the constitutionality of said act; but since its submission two other cases (*The State ex rel. St. Joseph & Denver Railroad Company v. The Commissioners of Nemaha county*; and *Morris et al. v. The Commissioners, etc., of Morris county*), involving the same question, have been submitted to us, in which able and exhaustive arguments have been made by able counsel on both sides. We shall, therefore, not only consider the points made by counsel

in this case, but will also consider the points made by counsel in the other two cases, so far as they have any application to this case. In the first of said cases, which is an application for a writ of mandamus, we shall in connection with this case deliver an opinion and allow an alternative writ of mandamus to issue. In that case, as in this, we affirm the constitutionality of said act; but in that case we shall leave all other questions to be decided upon the return of the alternative writ.

This is, beyond all comparison, the most important question ever brought before this court for decision. While it is true that the amount involved in this particular controversy is comparatively small, yet the decision in its ultimate consequences involves millions of dollars. Fabulous amounts of county and municipal bonds have already been issued and thrown upon the market with a profusion and prodigality bordering on recklessness and culpable extravagance, "and the end is not yet." And this decision in its ultimate consequence determines the validity or invalidity of all these bonds. But our duty is plain. The question presented to us for our consideration is purely a legal question. We have nothing to do with the wisdom or the policy of issuing such vast amounts of county and municipal bonds. That belongs to the legislature, and the people who vote to issue them. We simply determine whether the legislature had the *power* to authorize their issue; and not whether they acted wisely or unwisely in exercising such power. We are not the guardians of the legislature in this respect, nor of the people who vote to issue bonds; nor are we responsible for their acts, whatever may be the consequences.

We suppose that it will be conceded by every one that the legislature have no *inherent* power of any kind; that they possess no power except such as is delegated to them by the people; and that unless the constitution of the State authorizes them to enact such a law as the one now under consideration, they had no authority to do so. On the other hand, we suppose it will be conceded that the people are the original source and fountain of all civil and political power; that in their primary capacity they are supreme; that they had ample authority to exercise all of this power themselves, or, if they so chose, to delegate the same exclusively to the legislature. In short, we suppose it will be conceded that the people had full power and authority to delegate to the legislature all the power necessary to pass said act. The question, then, is, not whether the

people had the power to authorize the legislature to pass said act, for that must be conceded; but it is, whether the people actually did so authorize the legislature to pass such acts. The counsel who claim that said act is unconstitutional, have seen fit to call our attention to certain sections of the constitution with which (and with these only, as we understand) they claim that the act is in direct contravention. We shall therefore first examine said sections before we proceed to examine the main question in this case, which is whether the people have, through the constitution, granted sufficient power to the legislature to pass said act. The sections of the constitution which are supposed to prohibit this species of legislation are as follows:

BILL OF RIGHTS, § 20. "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

ART. II, § 17. "All laws of a general nature shall have a uniform operation throughout the State."

ART. XI, § 8. "The State shall never be a party in carrying on any works of internal improvement."

We have no provision in our constitution as there is in the constitutions of most of the States, requiring that private property shall not be taken except by "due process of law," or by "due course of law," or by the "law of the land," or "for public use without just compensation." The nearest that any thing in our constitution comes to it is as follows:

BILL OF RIGHTS, § 18. "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

ART. XII, § 4. "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation."

We do not suppose that these omissions from our constitution affect, in the least, any question involved in this case; but their omission explains the reason why counsel for plaintiffs in error have failed to make any point on them. See Sedg. on Stat. and Const. Law (1st ed.), 501, *et seq.* We can see no possible application that can be made in this case of section 20, Bill of Rights. It will be admitted that without that section the legislature cannot exercise any

Commissioners of Leavenworth County v. Miller.

power retained by the people or not delegated by the people to the legislature, and that is all that can be claimed with the section. And it is impossible for us to see that said section in any way enlarges the power of the court to nullify acts of the legislature.

We scarcely think it necessary to say any thing with reference to § 17, article 2 of the constitution. The act under consideration is so obviously in harmony with this section, that the question attempted to be raised upon its supposed incongruity needs no elucidation from us. All the provisions of said act are expressly enacted for the whole State, and for every part of the State; and it is no more necessary that the same amount of stock be taken in each and every county of the State, in order that the act shall have a uniform operation therein, than that the same number of men shall be executed in each county of the State, in order that the law punishing murder in the first degree shall have a uniform operation throughout the State. Scarcely any of our laws have had any actual or practical operation out in the buffalo region, and yet it will hardly be contended that they are unconstitutional for that reason.

It is contended by counsel for plaintiff in error that, as by § 8 of article 11 of the constitution, the State is prohibited from ever being a party in carrying on any works of internal improvement, each subordinate political subdivision of the State, such as counties, cities, towns, etc., must also necessarily be so prohibited. This construction of said section we think is erroneous, and arises from a misconception of the meaning of the word "State" as used in this connection. We think the word "State," as here used, means the people of the State as a sovereign corporation, and not the people of the State considered as individuals or minor and subordinate corporations. That it does not mean property or the territory of the State, all will admit; for such inanimate objects could not be a *party in carrying on* any work of internal improvement, or in carrying on any thing else; and that it does not mean the people considered as individuals, or subordinate corporations, we think we can show. If it be claimed that said word means The State, in all its parts, it will lead to inextricable difficulties, and prove entirely too much. The people as individuals are the original elements out of which the State is composed, and each individual is as much a part of the State as any corporation, public or private. And we suppose it will hardly be contended that the people of the State as individuals could not engage in any work of internal improvement.

But a distinction may be made between the people as individuals, and as organized into corporations. The people as individuals do not obtain their power from the State; their power is original and inherent, while the power of corporations is obtained entirely from the State, and is purely derivative and delegated. But whenever this distinction is resorted to, it is a virtual abandonment of the claim that the State is prohibited *in all its parts* from engaging in works of internal improvement, and it is setting up another claim, that the State is thus prohibited only in such of its parts as it itself creates. And this claim is equally untenable. A private corporation is wholly created by the State, as much so as a public corporation. It has no inherent power and does not exist of itself. It is an artificial being, invisible, intangible, and exists only in contemplation of law. It is the mere creature and the creation of the State in which it exists, and has no power of its own. And cannot a private corporation engage in works of internal improvement? Nobody will say that it cannot; and hence this claim must also be abandoned. But it may be claimed that there is a distinction between public and private corporations; that public corporations are created solely for governmental and public purposes, and that private corporations are created merely for private purposes; and that, while the State may effect purposes through the agency of private corporations which it could not effect directly through its own agency, yet that it cannot effect any object through the agency of a public corporation which it could not effect directly through its own agency; that it can perform just such acts and no more through the agency of public corporations, as it could perform directly through its own agency. The argument drawn from this distinction is equally as fallacious as the others. The State as a State is absolutely prohibited from engaging in any works of internal improvement. We will concede that this prohibition does not extend to the building of a State house, penitentiary, State university, and such other public improvements as are used exclusively by and for the State, as a sovereign corporation; but it does extend to every other species of public improvement. It certainly extends to the construction of every species of public improvement which is used, or may be used by the public generally — by any and every private individual who may choose to use it, such as public roads, bridges, etc. *Mayor, etc., of Wetumpka v. Winter*, 29 Ala. 660. Now, notwithstanding this prohibition upon the State, notwith-

Commissioners of Leavenworth County v. Miller.

standing that it is prohibited from opening up or constructing any roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, water-works, gas-works, or the like, yet we find it authorizing public corporations to do so. And although it is prohibited from exercising the sovereign power of eminent domain in its own favor in opening up and constructing roads, highways, bridges, ferries, etc., yet we nevertheless find it exercising said sovereign power in favor of public corporations. Even a private corporation or individual cannot construct or operate a railroad over the land of another without the owner's consent, unless the State first so far becomes a party in carrying on such improvement as to authorize such private corporation or individual to take said land under the sovereign power of eminent domain. Hence we find that those who claim that the prohibition upon the State is also a prohibition upon all the public corporations of the State, are driven from every position they may assume. If they claim that it is a prohibition upon the State in all its parts, then they prohibit individuals from constructing internal improvements. If they claim that it is a prohibition upon such of its parts only as are created by the State itself—artificial persons—corporations—then they prohibit private corporations. And, if they claim that the prohibition applies to public corporations, and to them only, then they prohibit counties, townships, and road districts, from constructing roads, bridges, etc.; and cities, towns and villages, from constructing streets, sidewalks, drains, etc. But the end is not yet; there are still further and perhaps greater difficulties in the way.

Sections 5 and 6 of the same article which prohibits the State from ever becoming a party to any works of internal improvement, provide that the State shall not contract debts to exceed \$1,000,000, unless the same be authorized by a direct vote of the people. Will it be contended that this prohibition embraces within its scope and operation the subordinate political subdivisions of the State, as well as the State in its sovereign corporate capacity? It has never been so understood. The State has already gone to the full limit of \$1,000,000 in contracting public debts. Leavenworth county has probably gone as far. Many other counties and cities have also contracted large amounts of public debts, and if counties, townships, school districts, road districts, cities, towns and villages, are all embraced within this prohibition—

if the public debt of the State, including all its subdivisions, cannot, in the aggregate, exceed \$1,000,000, then a vast amount and number of illegal debts have already been created in Kansas, and the whole people of the State have been continually and ruthlessly violating their own constitution in this regard. But if this prohibition, with regard to contracting public debts, is not an interdiction upon the political subdivisions of the State, how can it be said that the other prohibition is? Of course we recognize the maxim, *qui facit per alium, facit per se*, as embodying a sound principle of law; but it can have no possible application to the question now under consideration. It is true that no county or municipal corporation can construct or operate a railroad except by the authority of the State; but it is equally true, as we have already seen, that no private corporation or private individual can construct or operate a railroad over lands belonging to another without the owner's consent, except through the intervention and by the authority of the State; and no railroad has ever been constructed in this State except by positive authority given by the State. Now, if it be claimed that the State, by authorizing a county or municipal corporation to become a party in the construction or operation of a railroad, thereby becomes a party to the same itself, then it must necessarily follow that the State, by authorizing a private corporation or private individual to become a party in the construction or operation of a railroad, must also necessarily thereby become a party itself in the construction and operation of such railroad. It is true, that in one sense the State becomes a party in the construction and operation of a railroad whenever it authorizes the same to be built, but not in the sense contemplated by the prohibition in the constitution. It was not the intention of the framers of the constitution to entirely exclude internal improvements from the State. It was not their intention to entirely prohibit the construction of the same. But it was only to prohibit the State *as a State* from being a party thereto. It left the State as free to authorize others (that is, to authorize public or private corporations or individuals), to construct internal improvements as though the prohibition had never been placed in the constitution. Several other States have provisions in their constitutions similar to the one we are now considering, and several courts have already construed such provisions. The decisions are uniform with the exception of one decision in Iowa, *State v. Wapello Co.*, 13 Iowa, 388, which decision has never

Commissioners of Leavenworth County v. Miller.

since been followed in Iowa or elsewhere—all sustaining the construction that we have given to said provision: See *Cass v. Dillon*, 2 Ohio St. 607, 612 to 616; *Pattison v. Board Sup. Yuba Co.*, 13 Cal. 175, 182; *Clark v. City of Janesville*, 10 Wis. 136, 170; *Bushnell v. Beloit*, id. 195, 221; *Slack v. Maysville & L. R. R. Co.*, 13 B. Monr. 1; *Dubuque v. Dubuque R. R. Co.*, 4 G. Greene (Iowa), 1, 3; *Clapp v. Cedar Co.*, 5 Iowa, 15; *Stewart v. Sup. Polk Co.*, 30 id. 9; *Prettyman v. Supervisors, etc.*, 19 Ill. 406, 411; *Robertson v. Rockford*, 21 id. 451, 457; *City of Aurora v. West*, 9 Ind. 77 to 79; *Police Jury v. McDonough's Succes'n*, 8 La. An. 341; *New Orleans v. Graible*, 9 id. 561; Cooley's Const. Lim. 216-219. In closing this branch of the case, we would say that the constitution means just what it says. It says the *State* shall never be a party in carrying on any works of internal improvement, and it means the *State*, and not *Leavenworth county*; and to hold that this restriction upon the State is also a restriction upon counties, cities, etc., is to put words in the constitution which its framers omitted, and to overturn a well-settled rule of constitutional and statutory construction: *Expressio unius est exclusio alterius*.

On the side of the defendant in error, we have been referred to the following sections of our constitution:

ART. II, § 21. "The legislature may confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient."

ART. XII, § 5. "Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

We do not suppose that these sections can, in any way, affect the decision of this case. No legislative power was exercised by the people or the county commissioners of Leavenworth county. *Lafayette M. & B. R. Co. v. Geiger*, 34 Ind. 220, *et seq.*; *Cincinnati W. & Z. R. v. Com'rs of Clinton Co.*, 1 Ohio St. 77; Cooley's Const. Lim. 116-119, and authorities cited. And section 5, article 12, referred to, does not authorize counties to contract debts, loan their credit, etc., and it does not authorize either counties or cities, towns or villages, to contract debts, loan their credit, etc., in carrying on any works of internal improvement.

II. Having disposed of all the preliminary questions raised in this
VOL. XII. — 55

Commissioners of Leavenworth County v. Miller.

case, which were probably thrown in only as make-weights, and finding that there is no express provision of the constitution with which the said act is in contravention, we come now to the main question in the case, which is, whether the constitution of the State authorizes the legislature to pass such an act as the one under which the bond in controversy was issued. All there is of importance in this case is involved in this question. The question of whether an act of the legislature is constitutional or not is now really before us.

The mere passage of the act is some evidence of its constitutional validity, for the legislature could not have passed nor the governor have approved the same, without impliedly, at least, declaring that the same was constitutional and valid. And this, both the legislature and the governor have done, after taking a solemn oath to support the constitution. We shall not claim, however, that this is the strongest kind of evidence in favor of the constitutionality of the act, for neither the executive nor the legislature are elected with special reference to their ability to expound the laws or the constitution. But with this in its favor, and looking only to this, we should not declare the act unconstitutional unless the reasons against its constitutionality at least preponderate over the reasons in favor of its validity. If the reasons are equally balanced, we should certainly declare in favor of its validity. The rule governing courts in this respect is usually expressed in much stronger terms. It is generally said (and this is probably the true rule) that before an act of the legislature can be declared unconstitutional, its unconstitutionality must clearly appear. *State ex rel. Crawford v. Robinson*, 1 Kas. 18, 27; *Atchison v. Bartholow*, 4 id. 124, 141. But some courts have gone further, and said that its unconstitutionality must clearly appear beyond all reasonable doubt. *Sears v. Cottrell* (per CHRISTIANCY, J.), 5 Mich. 257, 261; *Twitchell v. Blodgett* (per COOLEY, J.), 13 id. 162; *People v. Mahany* (per COOLEY, J.), id. 501; *Cooley's Const. Lim.* 182, and cases there cited.

Judge COOLEY says, in his work on Constitutional Limitations, that "The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it (the legislative power) must be considered as *practically absolute*, whether it operate according to natural justice or not."

* * * "Any legislative act which does not encroach upon the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative power can be

pointed out in the constitution, and the case shown to come within them" (page 168). "Nor are the courts at liberty to declare an act void, because, in their opinion, it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words" (page 171). But if we should adopt the stronger rule laid down by courts, it would virtually cut off all further inquiry into the constitutionality of said act; for this court would hardly assume to declare, in the face of twenty-five or twenty-six legislatures that have enacted similar statutes, and twenty-five or twenty-six executives that have approved the same, and twenty-five or twenty-six supreme courts — State and Federal — that have declared such statutes to be constitutional, that this act is clearly unconstitutional beyond all reasonable doubt, or even that it is clearly unconstitutional.

But, with reference to this particular statute, the strongest rule in favor of its constitutionality should be adopted. All presumptions are in favor of its validity. It was not passed through the hurry and bustle of hasty legislation; nor through inadvertence or oversight; nor through whim or capricious fancy; nor through the influences of party drill or party machinery; nor through chicanery, fraud or corruption; but it was passed after due deliberation and discussion. Besides, it is not an isolated statute, standing alone in questionable solitude upon the statute books of Kansas. Two-thirds of the legislatures of the Union have passed similar statutes, and two-thirds of the highest judicial tribunals of this country have declared them to be constitutional. And further, this statute in substance, though in some respects modified, still remains upon our statute book, although it has passed the scrutiny of six subsequent legislatures since its first adoption. It has, of course, been declared, and repeatedly declared, constitutional by the legislative and the executive branches of the State government, for it has repeatedly obtained their sanction and approval. This, to begin with, is certainly very strong evidence in favor of its constitutional validity. It will be conceded that the constitution does not anywhere, in definite and precise terms, authorize the passage of said act, and it will be conceded that unless such authority is given by section 1, article 2 of the constitution, it is not given at all. Said section reads as follows:

"SEC. 1. The legislative power of the State shall be vested in a house of representatives and senate."

The question then resolves itself into this: Was the passage of

said act the exercise of legislative power? If it was, the act is, of course, constitutional; but if not, then the act is certainly unconstitutional. It is claimed that the passage of the act was not the exercise of legislative power, and, therefore, that the legislature transcended their authority in passing the same, and that the act is void.

It is not claimed, as we understand, that the legislature invaded the province of one of the other departments of the government, but that it usurped power which had not been delegated to any of the departments, but was retained by the people. As the people have by the constitution clothed the legislature with all the legislative power of the State, the first great question is, what is "legislative power?" This may be answered by saying that it is the power to make the laws. But then the question, equally difficult, arises, what is a law? This may be answered by saying that it is a rule of civil conduct prescribed by the supreme power of a State, which, under the constitution, and for this purpose, is the legislature; and still we are left as much in the dark as we were before. Some things we know come within the scope of legislative power. Other things we know do not. But we have no rule by which we can always determine accurately and precisely whether a given thing comes within the scope of legislative power or not. Hence the difference of opinion we find among eminent jurists. We shall not attempt to give a definition of these words, nor prescribe a rule whereby it may be determined in all cases what falls within and what falls without the scope of legislative jurisdiction; but our inquiry shall be devoted entirely to ascertaining whether the authority granted to counties, and municipal corporations, to aid railroad companies by way of subscription to the capital stock thereof, and to issue bonds in payment therefor, falls within or without the scope of legislative authority.

That the people of the State had the authority to delegate to the legislature all the power that the legislature attempted to exercise in the passage of said act, we have already assumed as conceded. Hence, without being embarrassed by the discussion of any collateral questions, we shall proceed at once to the consideration of what we consider the main question in the case — the meaning of the words "legislative power," or rather, what did the people understand those words to mean when they framed the constitution; for upon such meaning depends the whole question in controversy in

Commissioners of Leavenworth County v. Miller.

this case. That words have no positive or absolute signification in and of themselves—no inherent meaning—is a proposition too well understood by educated men to need exemplification or citation of authority. That they are only conventional signs adopted by common consent and common usage to express certain ideas, and mean just what the people using them choose by common consent to make them mean, is too well settled to be disputed. And that they must always be presumed to mean, in the absence of any thing to the contrary, just what they were generally understood to mean when they were used, is too near axiomatic to be controverted. “The popular or received import of words furnishes the general rule for the interpretation of public laws as well as private and social transactions.” *Maillard v. Lawrence*, 16 How. (U. S.) 251, 261; *Wetumpka v. Winter*, 29 Ala. 651, 660. And who could indulge the extravagant supposition that the framers of a constitution for the people of a young and growing commonwealth having vast possibilities before it, should use language in a sense never before so used, and in such a sense as must necessarily mislead the very people for whom it is framed, and upon whom devolves the duty and necessity of its correct interpretation? Nothing has been shown or can be shown that will tend in the least to prove that the words we are now considering were used in any different sense or were intended to have any different signification from that ordinarily given to them. The question then is narrowed down simply to this: What were these words generally understood to mean at the time the constitution was framed? That they had a general signification with reference to the question now under consideration cannot be questioned; for about two-thirds of the States, as well as the United States, and the then territory of Kansas, had already given to them a construction. The constitution of Kansas was framed in 1859, and the State was admitted into the Union under it in 1861 (January 29). At this time, the meaning of these words, and the general scope and authority of legislative power with reference to this question, had become well-settled by legislative, executive, and judicial construction, practice, and usage. And while no room is left to doubt that these words had a general signification, no room is left to doubt what that signification was. All the decisions of the courts were one way, and in favor of the power of granting municipal aid to railroad companies, and not a solitary decision was at that time the other way.

 Commissioners of Leavenworth County v. Miller.

As early as 1837, the question was settled, or at least decided by a court of last resort in Virginia: *Goodin v. Crumps*, 8 Leigh, 120; see also in 1846, *Harrison Justices v. Holland*, 3 Grat. 247, a navigation case; in 1871, *Langhorne v. Robinson*, 20 id. 661; and 5 Call, 139.

In 1843 in Connecticut: *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; see also in 1860, *Society for Savings v. New London*, 29 id. 174.

In 1846 in Pennsylvania: *Harvey v. Lloyd*, 3 Penn. St. 331; see also in 1849, *Commonwealth v. McWilliams*, 11 id. 62, a turnpike case; in 1853, the great case of *Sharpless v. The Mayor of Philadelphia*, 21 id. 147; *Moers v. The City of Reading*, id. 188; in 1858, *Commonwealth v. Com'rs Allegheny Co.*, 32 id. 218; in 1861, *Commonwealth v. Pittsburgh*, 41 id. 278; in 1862, *Commonwealth v. Perkins*, 43 id. 400.

In Tennessee in 1848: *Nichol v. Nashville*, 9 Humph. 252, 271; see also in 1854, *Louisville & N. R. Co. v. Davidson Co.*, 1 Sneed, 637; in 1859, *Hord v. Rogersville, etc., R. R. Co.*, 3 Head, 208; *Byrd v. Ralston*, id. 477; in 1869, *Justices of Campbell Co. v. The Knoxville & Ky. R. R. Co.*, 6 Coldwell, 598.

In Kentucky in 1849: *Talbot v. Dent*, 9 B. Monr. 526; see also in 1850, *Justices, etc., v. P. W. & K. R. River Turnpike Co.*, 11 id. 143; in 1852, *Slack v. Maysville & C. R. R. Co.*, 13 id. 1, in 1859, *Maddox v. Graham*, 2 Metc. 56.

In Illinois in 1851: *Ryder v. A. & S. R. R. Co.*, 13 Ill. 516; see also in 1858, *Prettyman v. Sup. Tazewell Co.*, 19 id. 406; in 1859, *Robertson v. Rockford*, 21 id. 451; in 1860, *Johnson v. Stark Co.*, 24 id. 75; *Perkins v. Lewis*, id. 208; in 1861, *Butler v. Dunham*, 27 id. 474; in 1862, *Clarke v. Hancock Co.*, id. 305; *Piatt v. People*, 29 id. 54; in 1864, *Keithsburg v. Frick*, 34 id. 405.

In Florida in 1852: *Cotten v. County Commissioners*, 6 Fla. 610.

In Ohio in 1852: *C. W. & Z. R. R. Co. v. Com'rs Clinton Co.*, 1 Ohio St. 77; *Steuben, etc., R. R. Co. v. Treasurer N. Tp.*, id. 105; see also in 1853, *Cass v. Dillon*, 2 id. 607; *Thompson v. Kelly*, id. 647; in 1857, *State v. Van Horne*, 7 id. 327; in 1858, *State v. Union Tp.*, 8 id. 394; in 1861, *State v. Com'rs Hancock Co.*, 12 id. 596; in 1863, *Knox v. Nichols*, 14 id. 260; *Fosdick v. Perrysburg*, id. 472; *Shoemaker v. Goshen Tp.*, id. 569.

In Louisiana in 1853: *Police Jury v. Succession of McDonough*, 8 La. An. 341; see also in 1854, *New Orleans v. Graible*, 9 id. 561;

Commissioners of Leavenworth County v. Miller.

in 1856, *Parker v. Scogin*, 11 id. 629; *V. S. & T. R. W. Co. v. Parish of Ouachita*, id. 649.

Ir. Iowa in 1853: *D. & P. R. R. Co. v. Dubuque*, 4 G. Greene, 1, see also in 1854, *State v. Bissell*, 4 id. 328; in 1857, *Clapp v. Cedar Co.*, 5 Iowa, 15; in 1858, *Ring v. Johnson Co.*, 6 id. 265; *McMillan v. Boyles*, id. 304; *McMillen v. Lee Co.*, id. 391; in 1859, *Whittaker v. Johnson Co.*, 10 id. 161.

In Alabama in 1854: *Stein v. Mayor of Mobile*, 24 Ala. 591; see also in 1857, *Wetumpka v. Winter*, 29 id. 651, a plank-road case; in 1860, *Gibbons v. Mobile, etc.*, 36 id. 410.

In Mississippi in about the year 1854: *Strickland v. Miss. Central R. R. Co.*, not reported, but referred to in the case of *Williams v. Cammack*, 27 Miss. 224.

In North Carolina in 1855: *Taylor v. Newberne*, 2 Jones' Eq. 141, a navigation case; see also in 1858, *Caldwell v. Justices of Burke*, 4 id. 323.

In Missouri in 1856: *City of St. Louis v. Alexander*, 23 Mo. 483; see also in 1863, *Flagg v. Palmyra*, 33 id. 440; in 1867, *St. Joseph & C. R. R. v. Buchanan Co.*, 39 id. 485.

In New York in 1857: *Grant v. Courter*, 24 Barb. 232; *Benson v. The Mayor of Albany*, id. 248; *Clarke v. City of Rochester*, id. 446; see also in 1858, *Bank of Rome v. Village of Rome*, 18 N. Y. 38; in 1859, *Gould v. Town of Venice*, 29 Barb. 442; in 1861, *Starin v. Genoa*, 23 N. Y. 439; in 1864, *Clarke v. City of Rochester*, 28 id. 605; in 1865, *People v. Mitchell*, 45 Barb. 208; in 1866, *People v. Mitchell*, 35 N. Y. 551.

In South Carolina in 1857: *Copes v. Charleston*, 10 Rich. Law J. 491.

In Georgia in 1857: *Winn v. Macon*, 21 Ga. 275; *Powers v. The Inf. Ct. of Dougherty Co.*, 23 id. 65.

In Indiana in 1857: *Aurora v. West*, 9 Ind. 74; see also in 1860, *Evansville, etc., R. R. v. Evansville*, 15 id. 395; in 1862, *Bartholomew Co. v. Bright*, 18 id. 93; in 1864, *Aurora v. West*, 22 id. 88.

In the United States supreme court in 1858: *Com'rs of Knox Co. v. Aspinwall*, 21 How. 539; *Same v. Wallace*, id. 547; see also in 1859, *Zabriskie v. Cleveland, etc., R. R. Co.*, 23 id. 381; in 1860, *Bissell v. City of Jefferson*, 24 id. 287; *Amey v. Allegheny County*, id. 365; *Com'rs Knox Co. v. Aspinwall*, id. 376; in 1861, *Woods v. Lawrence Co.*, 1 Black, 386; in 1862, 2 id. 722; in 1863, 1 Wall. 83, 175, 273, 291, 384, five cases; in 1865, 3 id. 93, 294, 327, 654, four

 Commissioners of Leavenworth County v. Miller.

cases; in 1866, 4 id. 270, 275, 535, three cases; in 1867, 6 id. 166, 210, 514, 518, four cases; in 1868, 7 id. 181, 383, two cases; in 1869, 9 id. 477. (There are too many cases to give the titles to all of them.)

In Wisconsin in 1859: *Clark v. Janesville*, 10 Wis. 136; also see in 1860, *Bushnell v. Beloit*, id. 195.

In California in 1859: *Pattison v. Board of Sup'rs of Yuba Co.*, 13 Cal. 175; also in 1860, *Hobart v. Sup'rs of Butte Co.*, 17 id. 23; 1863, *Robinson v. Bidwell*, 22 id. 379; in 1864, *French v. Teschemaker*, 24 id. 518; *People v. Coon*, 25 id. 635; in 1865, *People v. Sup'rs of San Francisco*, 27 id. 655.

In Maine in 1860, *Augusta Bank v. Augusta*, 49 Me. 507.

In Kansas in 1864; in West Virginia in 1865; in Texas in 1866; in Nevada in 1869, and in Vermont in 1870. The decisions in the five last-mentioned States are hereinafter cited.

But we are not left alone with the construction given to the term "legislative power," by the legislative, executive and judicial departments of other States and of the United States. We have a construction of our own, given to said term by the legislative and the executive departments of the then territory of Kansas before and during the time the constitution was being framed. In 1858, the legislature and the governor of said territory authorized the city of Atchison to subscribe for stock in and issue bonds to railroad companies. Private Laws of 1858, 182, §§ 30, 31. In 1859, the next legislature and the governor of said territory authorized Leavenworth county to make similar subscriptions, and to issue bonds in payment therefor. Gen. Laws of 1859, 69; and, on the same day (February 11, 1859), they took the initiatory steps in framing the present constitution of the State of Kansas. On that day they passed the act under which the constitution was framed (Gen. Laws, 1859, 292); and on that day they gave a construction to the term "legislative power," with reference to municipal aid to railroad companies. And this construction the people have never overruled or repudiated in framing their constitution, or in any other manner, from that time till the present. In 1860, after the people had adopted the constitution, but while it was still pending before congress, and before the State was admitted into the Union under it, another territorial legislature and another territorial governor again determined in favor of the power of the legislature to pass acts granting municipal aid to railroad companies. They

Commissioners of Leavenworth County v. Miller.

passed three acts recognizing this power—one for Leavenworth county (Gen. Laws, 1860, 29), one for Leavenworth city (id. 32), and one for the city of Atchison (Private Laws, 1860, 53).

We suppose that nobody will claim that the territorial legislature had more power in this respect than the State legislature. The territorial legislature had nothing but legislative power, and that is just what the State legislature have. The territorial legislature held their authority under the "organic act," which provides "that the legislative power and authority of said territory shall be vested in the governor and legislative assembly." § 22. The State legislature hold theirs under the State constitution. The organic act was framed by congress; the constitution was framed by the people of the State. The territorial legislature had all the legislative power in this respect that congress had power to give them. The State legislature have all the legislative power that the people of the State have power to give them. Then whose power is the greatest—that of the territorial legislature, or that of the State legislature? That of congress, or that of the people in the primary capacity? It has generally been supposed, and we presume it will be so conceded, that the power of the people in their primary capacity is unbounded, unlimited. Is it so with congress? Has any jurist ever said that it was so? Will any lawyer of any respectability hazard his professional reputation by declaring that it is so? We think not, and yet we shall not in the least question the power of congress upon this particular subject. In fact, this court has already decided that congress possesses all the power necessary upon this particular subject. *Burnes v. Atchison*, 2 Kas. 454; *Atchison v. Butcher*, 3 id. 104.

With all this before us, is it possible to come to any other conclusion than that the people knew what was generally understood by the term "legislative power," and that they adopted the constitution with that construction. "The constitution must receive an interpretation according to the sense in which the people are supposed to have understood its language." *Mayor, etc., of Baltimore v. State*, 15 Md. 376, 461; *Maillard v. Lawrence*, 16 How. (U. S.) 251, 261; *Wetumpka v. Winter*, 29 Ala. 651, 660. The foregoing conclusion must also follow, because this general understanding before and after the adoption of our constitution was a contemporaneous construction of said term. *Cooley's Const. Lim.* 67, *et seq.*, and cases there cited; *Portland Bank v. Apthorp*, 2

Commissioners of Leavenworth County v. Miller.

Mass. 257; and also because whenever a provision of law is adopted by one State from another, as this constitutional provision of ours was, the judicial construction given to it in the State where it originated, follows it to the State of its adoption. *Bemis v. Becker*, 1 Kas. 226, 248, 249; *Stebbins v. Guthrie*, 4 id. 353, 364; *Drennan v. The People*, 10 Mich. 175 to 177. But even the passage of said acts by our own territorial legislature before the adoption of the constitution is of itself sufficient, in the absence of any thing to the contrary, to show that the people of the State intended to confer upon the State legislature power to authorize municipal aid to railroad companies; for as the territorial legislature had repeatedly exercised such power as legislative power, it must necessarily be presumed that the State legislature acting for the same community would also exercise such power as legislative power unless prohibited therefrom. But as there is no such prohibition in the constitution it must necessarily follow that the people of the State intended, by leaving such prohibition out of the constitution, that the legislature should continue to exercise such power as legislative power. *Mayor, etc., of Baltimore v. State*, 15 Md. 376, 461; *State v. Wayman*, 2 Gill & Johns. 284, 285. Laws in force at the time the constitution is framed must be considered as the groundwork and basis of the constitution itself. (See last case cited.)

Since the adoption of the constitution of this State, four or five other States besides those that we have already mentioned as having decided the question before our admission, have declared in favor of the constitutional validity of acts granting municipal aid to railroad companies. Kansas: *Burnes v. Atchison*, 2 Kas. 454, decided in 1864; *Atchison v. Butcher*, 3 id. 104, decided in 1865; and *The State ex rel. Hurd v. The Mayor and Council of the City of Leavenworth*, not reported, decided in 1868. West Virginia: *Goshorn v. Sup. Ohio Co.*, 1 W. Va. 308, decided in 1865. Texas: *San Antonio v. Jones*, 28 Texas, 19, decided in 1866. Nevada: *Gibson v. Mason*, 5 Nev. 283, decided in 1869. And the same doctrine has recently been recognized in Vermont: *Danville v. Railroad Co.*, 43 Vt. 144, decided in 1870—making in all about twenty-seven States, and the United States.

All of the States have, impliedly at least, declared what we consider to be the true doctrine that the general grant of legislative power carries with it the power to pass acts authorizing county and municipal aid to railroad companies, and in some of the States the

Commissioners of Leavenworth County v. Miller.

courts have expressly so decided. *Burnes v. Atchison*, 2 Kas. 454, 486; *Thomson v. Lee Co.*, 3 Wall. 327, 654; *People v. Mitchell*, 35 N. Y. 551; *Grant v. Courter*, 24 Barb. 232; *Benson v. Mayor of Albany*, id. 248; *Clarke v. City of Rochester*, id. 446; *Caldwell v. Justices of Burke*, 4 Jones' Eq. (N. C.) 324; *Copes v. Charleston*, 10 Rich. (S. C.) 495, 501.

III. The real question in this case is, whether the legislature has the constitutional power to authorize counties and municipal corporations to *subscribe for stock* in railroad companies, and to issue their bonds in *payment* therefor, and not whether the legislature have power to authorize counties and municipal corporations to make *donations* to railroad companies. In favor of the power to make subscriptions, etc., we have the decisions of about twenty-six States. Against the power, we have the decisions of one State alone, and that is Iowa. The principal decisions in Iowa against this power are: *The State v. Wapello Co.*, 13 Iowa, 388; *Chamberlain v. Burlington*, 19 id. 395; and *McClure v. Owen*, 26 id. 243. But the supreme court of the United States has overruled all these decisions: *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Meyers v. Muscatine*, id. 384; *Thomson v. Lee Co.*, 3 id. 327; *Rogers v. Burlington*, id. 654; *Riggs v. Johnson Co.*, 6 id. 166; *Weber v. Lee Co.*, id. 210; *U. S. v. Council of Keokuk*, id. 514, 518; *Benbow v. Iowa City*, 7 id. 313; *Lee Co. v. Rodgers*, id. 181. But it has been denied by very high authority that any decision has ever been made even in Iowa declaring the unconstitutionality of such acts as we are now considering. *Hansen v. Vernon*, 27 Iowa, 28; 1 Am. Rep. 215; *Stewart v. Sup. of Polk Co.*, 30 Iowa, 10; 1 Am. Rep. 238. But admitting that such decisions have been made in Iowa, still the same court (as well as the supreme court of the United States), in a more recent decision have swept away every vestige of the principle upon which the former decisions of the supreme court of Iowa are supposed to have been founded. *Stewart v. The Sup. of Polk Co.*, *supra*; *King v. Wilson*, 3 Chicago L. N. 137; 1 Dillon's Cir. Ct. Rep. 555. Hence, no court of last resort can now be found, that holds that county and municipal aid to railroad companies by way of subscription to the capital stock thereof, is not a legitimate subject of legislation. There are, however, now just four decisions in the United States against the validity of *donations* to railroad companies; one in New York: *Sweet v. Hulbert*, 51 Barb. 312; one in Iowa: *Hanson v. Vernon*, 27 Iowa, 28; 1 Am. Rep. 215,

one in Wisconsin: *Whiting v. The Sheboygan R. R. Co.*, 25 Wis. 167; 3 Am. Rep. 30; and one in Michigan: *The People ex rel. v. Salzm.*, 20 Mich. 452; 4 Am. Rep. 400. The first of these decisions is entitled to but little consideration as a precedent, as it was not rendered by a court of last resort. The second has since been overruled by the same court. *Stewart v. The Sup'rs of Polk Co.*, 30 Iowa, 9; 1 Am. Rep. 238. This leaves two decisions only — one in Wisconsin, and one in Michigan, standing solitary and alone, in opposition to even this species of legislation; and these are not authorities, as we shall presently see, against *subscriptions to the capital stock* of railroad companies. The supreme court of Wisconsin is composed of three judges, one of whom dissented. The supreme court of Michigan is composed of four judges, one of whom dissented. The court of appeals in New York, the court of last resort in that State, decide in favor of the validity of *subscriptions*: *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Starin v. Genoa*, 23 id. 439; *Clarke v. City of Rochester*, 28 id. 605; *People v. Mitchell*, 35 id. 551; and the court rendering the decision reported in 51 Barb. 312, acknowledge the binding force of the decisions made by the court of appeals, but claim that there is a material difference between donations and subscriptions; that they are not both governed by the same principles; that one may be valid and the other invalid. The supreme court of Wisconsin decides in favor of the validity of *subscriptions*: *Clark v. Janesville*, 10 Wis. 136; *Bushnell v. Beloit*, id. 195; and against the validity of *donations*: *Whiting v. Sheboygan R. R. Co.*, 25 Wis. 167. In the latter case the court made two decisions, and in each decision they made a labored argument to show a distinction between subscriptions and donations, and to show that the former are valid and the latter invalid. 25 Wis. 186, 209. See also note of Mr. Chief Justice DILLON, who wrote the opinion of the court in the case of *Hanson v. Vernon*, 27 Iowa, 35; 1 Am. Rep. 215, published in the 9 Am. Law Reg. (N. S.) 172, 175.

We suppose that it will be admitted that it is a duty incumbent upon all governments to provide suitable and sufficient facilities for the travel and commerce of the country. Canals, roads, bridges, and other artificial means of passage and transportation from one part of the country to the other, have been made by the sovereign power and the public expense, in every civilized State of ancient and modern times. And to-day, this State constructs, through the agency of subordinate public corporations, all

our common roads, bridges and thoroughfares. In many parts of the civilized world, and particularly on the continent of Europe (and in every part it might be done), the railroads of the country are constructed, owned and operated by the government. Many of the States of this Union have constructed, owned and operated both railroads and canals, and their right to do so, so far as we are informed, has never been questioned. Some of the States are doing this very thing to-day, without the least suspicion that they are transcending the legitimate bounds of governmental jurisdiction. It must, therefore, be admitted that, in the absence of constitutional restrictions, this State might construct, own and operate all the railroads within the boundaries of the State. It must also be admitted that whatever the State may do in providing artificial means of travel and transportation, it may do through the agency of subordinate public corporations, such as counties, cities, towns and villages, which may be locally benefited by such improvements. We have already seen that there is no constitutional restriction upon constructing works of internal improvement through the agency of subordinate public corporations, such as counties, cities, towns and villages. Hence it logically follows that the State may, through the agency of such subordinate public corporations, construct, own and operate all the railroads within her territorial boundaries. It will also be admitted that the State may construct railroads through the agency of private corporations, or of private individuals. Now, if the construction of a railroad is a public duty which the State may either cause to be done entirely through the agency of public corporations, and at the public expense, or entirely through the agency of private corporations or private individuals, it seems to follow as a logical consequence that such a work may be done partly through the agency of a public corporation, and partly through the agency of a private corporation or of private individuals. If private enterprise will take hold of such public improvements and construct them, all experience has shown that it is better to let private enterprise do it. But if private enterprise will only perform a part, is it not better to let private enterprise perform that part, and the public perform the other part, than that the public shall be entirely deprived of all the benefits of such necessary and valuable improvements? And further, if a county should purchase all of the stock in a railroad company, the county would then own the entire road, and might, we presume, operate the same

without any grave constitutional objection being urged against such a transaction. Then why may not the county purchase a portion of the stock, and operate the road in conjunction with the other stockholders, who are private individuals, and who own the remainder of the stock?

While there is an obvious distinction between subscriptions and donations, still we do not suppose that the Wisconsin and Michigan decisions are founded entirely upon the doctrine that donations to railroad companies are illegal, simply because they are donations. The power of governments and governmental organizations to make donations has been exercised ever since governments were instituted, and, we presume, always will be. Swords, banners, and all other mementoes for meritorious conduct, have always been, and, we suppose, always will be donated by governments and municipal organizations. Two hundred thousand dollars in money, and a township of land, were donated in 1824 by the general government to General La Fayette. Millions of dollars as pensions, and millions of acres of land, and land warrants, have been donated to the soldiers of the republic since its organization. And the government is now generously donating artificial limbs to disabled soldiers who lost limbs in the war of the rebellion. During the rebellion, the general government, and almost every loyal State, county, city, township and hamlet, gave bounties to soldiers enlisting in the service of their country. Bounties have been everywhere given for the destruction of wild beasts and other public pests. This State is now giving bounties to those who grow forest trees, plant hedges and build stone fences. Gen. Stat. 465, 1094. Schools are made free for the poor as well as for the rich. Asylums are established for the deaf, dumb, blind and insane. Hospitals are opened in many parts of the world for the sick, the diseased, the disabled, and the infirm. The poor and the destitute are fed and clothed at the public expense. Homesteads are given by the general government to actual settlers upon the public lands. And many millions of acres of the *public lands* have been *donated to railroad companies* by the general government within the last thirty years. If the Wisconsin and Michigan courts had simply said that *donations* to railroad companies were illegal because they were *donations*, their decisions would not affect this case in the least; but they have gone farther, and have said that they are illegal because they are given to *railroad companies*. The reasons given why donations to railroad companies

are illegal are, *first*, that railroad companies are *private* corporations (forgetting of course that such donations as are everywhere admitted to be legal, are nearly always given to *private* corporations or to *private* individuals); and *second*, that said donations are given for a *private purpose*. Now whatever may be the case with reference to municipal aid to railroad companies being a private purpose, in Wisconsin or Michigan, we think we have already demonstrated that such is not the case in Kansas; that the people of Kansas, in their primary capacity, in framing their constitution have determined otherwise, and, as we shall attempt to show, have determined rightly. But whether rightly or wrongly, from the people in their primary capacity there is no appeal. Their decision is final. Whatever they have determined in and by their constitution, we must determine. We are not above the constitution. We as judges are the mere creatures of it, and hold our authority under it, and from it, and must decide as it decides. Any other course would be usurpation. If we do not carry out the provisions of the constitution as the people understood them when they framed it, we are unworthy to hold the places we fill. It can hardly be supposed that when the people framed their constitution they intended to bring into existence a tribunal greater than the constitution itself; a tribunal with such potential force that it could destroy the provisions of the instrument upon which its own life and existence depends. It has heretofore been supposed by statesmen and jurists, that the constitution was a permanent and inflexible instrument; that it was the photograph of the people's *will*, indelibly fixed, and could only be amended by the people themselves in the prescribed form. It has heretofore been supposed that if a new truth, however valuable, should be discovered, the courts, however strong the temptation might be to startle the world with the announcement of it, would have no right to insert it in the constitution by judicial construction, or interpretation, but must wait and let the people, in their own proper time, make the desired amendment. And even where a society has outgrown its constitution, it has never been supposed that the courts could, through the means of judicial construction, so amend it, as to bring it up to the wants and needs of the more improved and further advanced condition of society.

We deny both the grounds on which it is claimed that municipal aid to railroad companies is unconstitutional. We deny that railroad companies are *strictly private* corporations, although we do not

claim that they are strictly public corporations; and we deny that municipal aid to railroad companies is *strictly for a private use*, although we do not claim that it is wholly for a public use, though the object intended by the government is a public purpose; and we further say that it makes no difference, so far as this case is concerned, whether a railroad company, as a company, is a *private* corporation or not. The whole question depends upon the ultimate object, use, or purpose, intended by the government in granting the aid to railroad companies — whether that object, use or purpose, is public or private, and not upon the nature or character of the means used in effecting or accomplishing that object.

This whole question has been argued as though it depended entirely upon the sovereign power of taxation. We do not think that it does, but as it has been so argued, we cannot well escape discussing the question to some extent in the same manner. The argument for plaintiffs in error in substance is this: 1. The dividends on the railroad stock which the county gets for its bonds, together with the stock itself, and all other resources of the county aside from taxation, will not pay the interest and principal of said bonds as the same become due; therefore the county will have to resort to taxation in order to pay said interest and principal. 2. Taxation can only be resorted to for a public purpose. 3. A railroad company is a strictly private corporation, and subscribing for stock therein and issuing bonds thereto is a strictly private purpose. 4. Therefore such subscriptions, etc., are unconstitutional. Now, we admit the first and second of these propositions, and deny the third and fourth. And we might here say that we admit what are claimed to be the three fundamental principles of taxation: 1st. Taxation must be for a public and not merely a private purpose. 2d. The taxes must be properly apportioned. 3d. The district taxed must have a special interest in and be specially benefited by the thing for which the taxes are levied. Taxation is not an independent power to be exercised aside from the other powers of the government. No society of men ever organized into a government, or into a municipal corporation for the mere purpose of taxing themselves. The power of taxation can never be invoked except in aid of one of the other powers. It is not of itself a sufficient foundation upon which to build any other power or action of the government. It is only a *servant* of the other powers, and can only be exercised in their support. And if the right to make county and municipal subscriptions

to railroad companies is founded upon no other power except the power of taxation, we admit it has no foundation whatever, and must of course fall. But on the other hand, if it be conceded that every other objection to the making of said subscriptions is removed — that nothing else stands in the way — that every thing else is favorable — that the right of the government is otherwise perfect — then every thing is virtually conceded, for the power of taxation (or the want of such power) can never be in the way of the exercise of any of the other powers of government, but must always, when necessary, contribute thereto. The power of taxation is the most universal power possessed by governments. It is co-extensive with every other power — it is an incident, a concomitant, an auxiliary of every other power. Whenever the government can act at all, it can resort to the power of taxation if necessary to make its action effective. And, although the government has no right to interfere in private affairs at all, yet, whenever the public interest, the public honor, the public gratitude, or public charity, requires it, the government may resort to its sovereign power of taxation without limit, until its interest, its honor, its gratitude, or charity, is entirely satisfied. Then it is that the power of the government, and the power of the legislature acting for the government, becomes unbounded; for the courts, whose duty it is simply to expound and declare the law, have no scales by which to determine the amount of the public interest, the amount of the public honor, the amount of the public gratitude, or the amount of the public charity, which will support and sustain taxation. This duty rests upon another branch of the government — the legislature; and it rests wholly in their discretion. That these views are correct we refer to the following authorities: Cooley's Const. Lim. 219, *et seq.*, and cases there cited; *id.* 479, *et seq.*, and cases there cited; *id.* 129, 488; *Town of Guilford v. Sup. Chenango Co.*, 13 N. Y. 143, 149; *Booth v. Woodbury*, 32 Conn. 128; *Brodhead v. City of Milwaukee*, 19 Wis. 652; *Speer v. School Directors of Blairsville*, 50 Penn. St. 150; *Waldo v. Portland*, 33 Conn. 363; *Bathlomev v. Harwinton*, *id.* 408; *Lowell v. Oliver*, 8 Allen, 247; *McCulloch v. Maryland*, 4 Wheat. 425 to 436.

IV. Let us now examine into the character of railroad companies so as to determine whether they are *public*, *quasi public*, or *private* corporations. For more than eighteen years, from 1852 up to 1870, when the case of *The People v. Salem*, 20 Mich. 452; 4 Am. Rep.

Commissioners of Leavenworth County v. Miller.

400, was decided, the doctrine of the supreme court of Michigan was that railroad companies were public, or *quasi* public corporations. In the case of *Swan v. Williams*, 2 Mich. 427, decided in 1852, that supreme court says: "Most certain it is, that, as to all their rights, powers and responsibilities, three grand classes of corporations exist. *First*, Political or municipal corporations, such as counties, towns, cities and villages, which, from their nature, are subject to the unlimited control of the legislature. *Second*, Those associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal and *railroad companies*; and *Third*, *Strictly private corporations*, where the private interest of the corporators is the primary object of the association, such as banking, insurance, manufacturing and trading companies." * * * "The *object* defines the *character* of these associations by whatever name they may be styled." * * *

"The object which determines the character of a corporation is that *designed by the legislature* rather than that *sought by the company*. If that object be primarily the private interests of its members, although an incidental benefit may accrue to the government therefrom, then the corporation is private; but, if that object be the public interest, to be secured by the exercise of powers *delegated for that purpose*, which would otherwise repose in the State, then, although *private interests* may be incidentally promoted, the corporation is in its nature *public* — it is essentially the *trustee* of the government for the promotion of the objects desired — a mere *agent* to which authority is delegated to work out the public interests through the means provided by government for that purpose, and broadly distinguishable from one created for the attainment of no public end, and from which no benefit accrues to the community except such as results incidentally and not necessarily from its operation. In the creation of this class of corporations, *public duties* and *public interests* are involved, and the discharge of those duties and the attainment of those interests are the primary objects to be worked out through the powers delegated to them. To secure these, the right of pre-eminent sovereignty is exercised by the condemnation of lands to their use, a right which never can be exercised for private purposes. *How, then, can they be regarded as private associations, from the acts of which an incidental benefit only springs to the public?*" 'Nor

Commissioners of Leavenworth County v. Miller.

can it be said that the property, when taken, is not used by the public, but by the corporators, for their own profit and advantage. It is unquestionably true that these enterprises may be, and probably always are, undertaken with a view to private emolument on the part of the corporators; but it is none the less true that the object of the government in creating them is public utility, and that private benefit, instead of being the occasion of the grant, is but the reward springing from the service." 2 Mich. 434 to 436.

In the case of the *Miners' Ditch Co. v. Zeleerbach*, 37 Cal. 543, 577, Chief Justice SAWYER says: "There are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a *quasi public character*, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important government powers, such as an exercise of the right of eminent domain; of this class are *railroad*, turnpike and canal companies; and corporations *strictly private*, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefit resulting from the promotion of trade and the development of the general resources of the country."

In the case of *Osborn v. The United States Bank*, 9 Wheat. 738, three important questions were decided: *First*. That congress had no power to create *private* corporations, the Federal government being a government of delegated powers, and the power to create *private corporations* not being among the powers delegated. *Second*. That congress had power to create corporations as instrumentalities by which to carry out a delegated power; and that such corporations were to be classed as *public corporations*. *Third*. That a banking corporation created for such a purpose, although four-fifths of its capital stock was owned by private individuals, and it was engaged, in part, in *private banking* business from which *private* and individual profit was derived (3 U. S. Stat. at Large, 266, *et seq.*), was nevertheless a *public corporation*. Chief Justice MARSHALL, who delivered the opinion of the court, said: "The bank is not considered as a private corporation whose principal object is individual trade and individual profit, but as a *public corporation*, created for *public and national purposes*. That the mere business of banking is in its own nature a private business, and may be carried on by

Commissioners of Leavenworth County v. Miller.

individuals and companies having *no political connection* with the government, is admitted; but the bank is not such an individual company. *It was not created for its own sake, or for private purposes.* It has never been supposed that congress could create such a corporation. It is not an instrument which the government found ready-made, and was supposed to be adapted to its purposes, but one which was created in the form in which it now appears, *for national purposes only.* It is undoubtedly capable of transacting *private* as well as *public* business. While it is the great instrument by which the fiscal operations of the government are effected, *it is also trading with individuals for its own advantage.* The appellant endeavors to distinguish between this trade and its *agency for the public*, between its banking operations and those qualities which it possesses in common with every other corporation, such as individuality, immortality," etc. 9 Wheat. 860, 861.

In this State the register of deeds accepts his office for *private* gain and emolument. His business is with and for *private* individuals. He is paid by the individuals for whom he does the work, and not by the State or the county. Is he a *public officer* or *strictly a private* individual? This same question might be asked with equal propriety with regard to several other public officers. In this connection, we would refer to the following authorities: *Bloodgood v. Mohawk, etc., R. R. Co.*, 18 Wend. 9, 15, 16; *Beekman v. Saratoga, etc., R. R. Co.*, 3 Paige, 45, 75; *Lexington, etc., R. R. Co. v. Applegate*, 8 Dana, 296; *Pratt v. Brown*, 3 Wis. 612; *Robbins v. Milwaukee, etc., R. R. Co.*, 6 id. 636; *Soens v. City of Racine*, 10 id. 820; *Raleigh, etc., R. R. Co. v. Davis*, 2 Dev. & Bat. (N. C.) 468; *Tinicam Fishing Co. v. Carter*, 61 Penn. St. 27; *Gibson v. Mason*, 2 N. H. 25; *State v. Town of Hampton*, 5 Nev. 285, 307, *et seq.*, and cases there cited; *Maunch Chunk v. Wescopeck*, 21 Penn. St. 47; *Sharpless v. Mayor*, id. 179; *Hasbrouck v. City of Milwaukee*, 13 Wis. 43.

It is undoubtedly true that railroad companies, in contradistinction to municipal corporations, are always classed as private corporations; and with this classification we find no fault; but to class them with other private corporations is a great mistake. They differ materially from all other private corporations in many respects, and with reference to them, ought to be classed as public. The sovereign power of eminent domain, which is always conferred upon railroad companies, has never been and could not be conferred upon

Commissioners of Leavenworth County v. Miller.

a strictly private corporation. And the government exercises a control over railroad companies in compelling them to carry passengers and freight, and in regulating the prices of the same to an extent never exercised over strictly private corporations or private persons. The power exercised by municipal corporations in regulating the fares of hackmen and draymen comes nearest to that exercised by the legislature in regulating fares and freights of railroad companies. But the former is only a police regulation in cities, while the latter is the exercise of a sovereign legislative power, founded upon the doctrine that a railroad company is a *public agency of the government*. And there are other distinctions between railroad companies and hackmen and draymen which we will hereafter mention as we proceed with this discussion. It will be admitted that a strictly private railroad corporation might be organized under the authority of the legislature, a corporation whose powers and duties would be similar in all respects to other private carriers of freight and passengers, such as the proprietors of stage-coaches, hacks, drays, etc.; and while such railroad corporation would be relieved, as other private carriers of freight and passengers are from many of the restraints and duties of a public or *quasi* public railroad corporation; while it would, of course, be free to carry any kind of freight it chose, or any class of passengers it chose, when it chose, or exclude all, and carry freight only for itself, yet it could not exercise the right of eminent domain as a public or *quasi* public railroad corporation does. It would have to purchase the land over which it should construct its road; but if the owner of the land would not sell, it could not build its road; its progress would necessarily come to an abrupt termination.

But as we have before stated, it makes no difference whether we call a railroad company a public, *quasi* public, or a strictly private corporation. It is the ultimate end, object, and purpose, that must determine the power of the legislature to act in the premises, and not the nature or character of the corporation or person through whose intermediate agency, this end, object, or purpose is expected to be accomplished. Nearly all the public works of this State, and of counties, cities, towns, and villages, have been accomplished through the agency of private corporations, or of private individuals. The work is usually let by contract to the lowest bidder, and no one has ever yet supposed that it was illegal because it was not done by a public officer or a public corporation. The most of the

Commissioners of Leavenworth County v. Miller.

public printing of this State has been done by private persons ; for up to 1869 we had no public printer. The public buildings are erected, mails carried, goods transported, and many other things we might mention are done for the public by private corporations or private persons. And it has never been contended, nor with reference to any other class of cases, that the government could accomplish a public purpose only through the agency of a public servant. It has heretofore been supposed that whatever the government did through the agency of a private corporation or private individual it did itself ; *qui facit per alium, facit per se*; and what valid objection can there now be raised to the government accomplishing a public purpose through a private agency? For the purposes, then, of this argument, we may well admit that a railroad company is a *private* corporation ; though we shall, of course, claim that the use of a railroad is a public use or purpose. But it is not only claimed that a railroad company is a private corporation, but it is also claimed that the property it possesses is strictly private property. And therefore it is claimed, with great confidence, that the use of such property must necessarily be strictly and absolutely a private use or purpose. A glaring *non sequitur*. A fallacy that ignores one of the fundamental principles of law — a principle older than railroads, older than any living jurist, old as law itself — the principle that the title to a thing and the possession thereof may be vested in one person for the use and benefit of another. The government seldom owns the building in which a post-office is kept ; it seldom owns any material portion of the furniture of the post-office ; and is the use of such property, for that reason, purely and strictly a private use? Suppose the State should employ an individual to carry stationery from the depot in North Topeka to the State House, would the transportation of such property be any the less a public purpose because the person so employed might be a private individual, and the wagon and horses with which he should transport the stationery might be private property? And will it be contended that no taxes could be levied nor public funds used to pay for the services of a postmaster and for the use of his house and furniture, or to pay for the services of said individual, and for the use of his horses and wagon, simply because the post-office and furniture and the horses and wagon are private property? And will it be contended that the carrying of said stationery is purely and strictly a private purpose? It may be private with regard to the

Commissioners of Leavenworth County v. Miller.

individual, but it is public with regard to the State and the public.

We have the combined authority of every legislature, of every executive, and of every court in the United States, that the construction and operation of a railroad, even in the hands of a (usually called) private corporation, is a public purpose; for if it were otherwise, every lawyer in the land knows that the sovereign power of eminent domain could not be exercised in its favor. This ought to be conclusive of the question; but it is said it is not *such* a public purpose as will support taxation. Strange indeed! The power of eminent domain is limited in its scope and operation to but few subjects. At every step it is traversed and opposed. Everywhere the plea of inexorable necessity must be interposed in its favor or its progress is ended. Not so with taxation. As we have already seen, taxation is the most universal, broad, sweeping and unlimited power possessed by governments. It is the power to destroy, and has no limit except in the will of the sovereign. Per MARSHALL, C. J., in *McCulloch v. Maryland*, 4 Wheat. 316, 425-436. No instance has been shown nor can be shown where the government may aid a thing by the power of eminent domain, where it cannot also aid it by the power of taxation. No instance has been shown nor can be shown where the government may aid a thing by the exercise of any of its sovereign powers, where it may not also aid it by taxation.

A railroad is a public purpose because it increases the facility for travel and transportation from one part of the country to another. In this respect it is a great and inestimable public benefit, which may be better described by others than by the courts. And yet there are other public benefits incidentally springing from the construction and operation of railroads. The increased value of all property within their vicinity is one; but this is probably only a measure of the value of the increased facility for travel and transportation. The increase of the public revenue is another, and this, or rather the decrease of the public burdens, cannot well be overestimated. As railroads progress, agriculture, trade and commerce, with all the arts and sciences of an enlightened civilization, follow in close proximity and with a celerity that would astonish the inhabitants of fairy land. Cities, towns and villages spring up with a marvelous growth that would rival the fabulous creations of Aladdin and his wonderful lamp; and in districts where the tax collec-

Commissioners of Leavenworth County v. Miller.

tor was never before known, immense revenues flow into the public treasury with a copiousness and a profusion that would astonish the wealthiest of the sovereigns of ancient or modern times. In Wisconsin it seems to be considered that the mere taking of stock in a railroad company, by a municipal corporation, is sufficient of itself to make the railroad a public purpose, such as will sustain taxation and render the act of the legislature authorizing it valid. *Whiting v. Sheboygan R. R. Co.*, 25 Wis. 167, 186, 209; 3 Am. Rep. 30.

Now, while we do not wish to controvert this doctrine, still we do not wish to found such a broad superstructure upon such a narrow basis. If a railroad company is purely a private corporation, and if the construction and operation thereof is purely a private purpose, neither the government nor any municipal corporation has any right to become a stockholder therein. Governments were not organized for the purpose of engaging in private enterprises or private business, but only for the transaction and promotion of public affairs. Even if the purchase of stock in a railroad company should be a paying transaction as an investment (which, unfortunately for counties and municipal corporations, it is not), still a governmental organization would have no right, for that reason alone, to engage in it, for governmental organizations are not created for the purposes of speculation, nor are they created for the purpose of enriching the organization as such, but only for the purpose of promoting the general welfare of the individual members thereof as citizens. The increased facility for travel and transportation is the main object in the creation of railroads, and this it is which constitutes a railroad a public purpose. All other benefits, though belonging of right to the public, are simply incidental. When this facility is made absolutely free by the government (all persons having the right to use it), all will admit that it is then a public purpose, and such a public purpose as will support both the right of eminent domain and taxation. When it is absolutely free, except that the government demands and receives a compensation for its use, all will admit that it is still a public purpose and such an one as will support both the right of eminent domain and taxation. When it is absolutely free, except that a railroad corporation receives the compensation instead of the government, though fixed by the government, all will admit that it is still a public purpose, and one that will support the right of emi

nent domain ; but it is denied by the plaintiffs in error that it will still support the right of taxation. Why this distinction is made in favor of the right of eminent domain and against the right of taxation has never yet been shown and cannot be shown. If any distinction is to be made, it should be (as we think we have heretofore shown) the other way — against the right of eminent domain and in favor of taxation. How is it that a railroad is so eminently a public purpose that the homestead, with all its endearments, may be taken from the owner, and himself and family, his wife and little children, driven out of doors, houseless and homeless, in order that the homestead may be converted in a roadway or depot, while at the same time the railroad partakes so little of a public character that one cent could not be levied as a tax to aid in its construction or operation ? How is it that to take the homestead is constitutional and valid, and to be encouraged, while to take the one cent tax is unconstitutional, invalid, and an unwarrantable infringement upon private rights ? Both are taken for the same purpose, to be applied to the same use, and to belong to and be controlled by the same corporation.

It is admitted that a railroad is a great public purpose, in one sense, because it adds vastly to the facilities for travel and transportation ; but it is claimed that it is also a great private purpose, in another sense, because it adds vastly to the private wealth of a private corporation. All admit that the government may deal with the railroad in its public sense, until the government has exercised the right of eminent domain in favor of the railroad, but then it is claimed that the government must forever afterward, and in all other cases, close its eyes upon the railroad as a public purpose, and see the railroad only in its private character. Is this logical ? As a railroad is a public purpose in one sense, and a private purpose in another, who shall dictate to the government in which sense it shall regard the railroad, or in which sense it may deal with it ? In the case of *Talbot v. Hudson*, 16 Gray, 423, 424, 425, the supreme court of Massachusetts use the following language: "The act is therefore in a certain sense for a private use, and inures directly to the individual advantage of such owners ; but this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. * * * We are therefore to look further into the probable operation and effect of the statute in question, in order to

Commissioners of Leavenworth County v. Miller.

ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred by it upon the defendants. If any such can be found then we are bound to suppose that the act was passed in order to effect it. We are not to judge of the wisdom or expediency of exercising the power to accomplish the object. The legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority. * * * In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, every thing which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community. It is on this principle that many of the statutes of this commonwealth by which private property has been heretofore taken and appraised to a supposed public use are founded. Such legislation has the sanction of precedents coeval with the origin and adoption of the constitution, and the principle has been so often recognized and approved as legitimate and constitutional that it has become incorporated into our jurisprudence."

Many parallels have been drawn between railroads and various other kinds of business, for the purpose of showing that a railroad is a private purpose and therefore not entitled to receive public aid. Now, analogical reasoning does not always lead with unerring certainty to the right conclusion, and in this case it wholly fails. It has been suggested that the right of eminent domain may be exercised in favor of mills (or rather mill-dams), bridges, ferries, etc., as well as in favor of railroads, and that the right of taxation cannot be exercised in favor of the former, and therefore it is inferred that taxation cannot be exercised in favor of railroads. Another glaring *non sequitur*. If it were true that mills, bridges, ferries, etc., could be aided by the exercise of the right of eminent domain, and not by taxation, it would not at all follow as a logical sequence that every thing else which could be aided by the exercise of the right of eminent domain could not be aided by taxation. But even if such would follow, still the premises upon which this supposed argument is founded are false, and therefore the conclusion may

also be false. If these were merely private mills, private bridges, and private ferries, neither the right of eminent domain, nor the right of taxation could be exercised in their favor; but if they are public, or *quasi* public, as a railroad is public, then there can be no sufficient reason given why both the right of eminent domain and the right of taxation may not be exercised in their favor.

The supposed parallel between railroads and hotels, stage coaches, hacks, drays, etc., fails in more particulars than the parallel attempted to be drawn between railroads and mills, bridges, ferries, etc. The opening of hotels, the running of stage coaches, hacks, drays, etc., has never been considered as incumbent upon governments. Governments have never undertaken to keep hotel, run stage coaches, etc., and it has never been considered that there was any moral or legal obligation resting upon them to do so. But the duty of opening highways, canals, and other like improvements for the accommodation of travel and commerce, has always been considered most binding upon all governments. In favor of railroads, and public mills, bridges, and ferries, the right of eminent domain has always been exercised, but in favor of hotels, stage coaches, hacks and drays, never. But if hotels, stage coaches, hacks, or drays, should ever become of such public importance as to authorize the exercise of the right of eminent domain in their favor, there can be no question but that the right of taxation might then also be exercised in their favor. It is also supposed that a parallel exists between railroads and physicians, printing establishments, and various other kinds of private business. Now, the similarity between a railroad and a physician, or a railroad and a printing press, is not very striking or obvious, and what there is of resemblance is in the wrong place for the benefit of the inference sought to be drawn therefrom.

It will be noticed that all of the examples given to prove that a railroad cannot be aided by taxation are of a purely private character, and not one of them of a public or *quasi* public character, such as a railroad undoubtedly is. Now, in order to make the argument drawn from these examples of any value whatever, it must be shown that if these occupations referred to were made public, like a railroad, and subject to all the restraints of a railroad, still they could not be aided by taxation. This has not been shown nor attempted to be shown. In fact it has not been shown nor attempted to be shown that all or any of these occupations men

tioned are not already of sufficient public character to be aided by taxation if the legislature should desire to do so. And again: If a perfect equality exists between railroads and all the different kinds of business and occupations, such as stage coaches, hacks, drays, printing presses, physicians, etc., so that taxation cannot be exercised in favor of the one, unless it can also be exercised in favor of the other, then it must necessarily follow that the right of eminent domain cannot be exercised in favor of the one, unless it can also be exercised in favor of the other; for instance, that the right of eminent domain may be exercised in favor of stage coaches, hacks, drays, printing presses, physicians, etc., which is contrary to all opinion, or that it cannot be exercised in favor of railroads, which is equally opposed to all opinion. And suppose there is in fact, as is claimed, no distinction between railroads and stage coaches, hacks, drays, etc., and that it is inconsistent and illogical for the law to make a distinction, will that absolutely prove that railroads cannot be aided by taxation? If consistency is all that is needed, why not say that stage coaches, hacks, drays, etc., *may be aided by taxation*, and then the consistency would be perfect? But every lawyer knows that the law is not always consistent or logical. The men who make the laws are not always profound statesmen or logicians. Chief Justice COOLEY, in the recent Michigan case (*People v. Salem*, 20 Mich. 485; 4 Am. Rep. 400), attempts to lay down a rule whereby we may know what may be aided by taxation and what may not. His language is as follows: "The term 'public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification to distinguish objects for which, according to *settled usage*, the government is to provide, from those which, by a like settled usage, are left to private inclination, interest, or liberality." See, also, Cooley's Const. Lim. 533. If this rule is correct, the whole question depends upon what is the *settled usage*, and not upon any rules of consistency or logic. Now admitting, for the sake of the argument, that all the supposed parallels attempted to be drawn between railroads and other kinds of business are critically exact, and still it seems to us clear beyond all doubt that railroads must fall within the rule prescribed by Judge COOLEY, although the other kinds of business may not. Has it not been the settled usage in this country, for the last thirty years, to aid railroads by taxation?

Commissioners of Leavenworth County v. Miller.

Are they not classed with the objects — the public purposes — for which the government will provide? There can be no doubt upon this question. It has been settled by an almost universal usage, and by a long list of judicial decisions, back to a time when this State was a wilderness, a part of the "Great American Desert," that railroads may be aided by counties and municipal corporations; and if the law as thus settled is inconsistent or illogical it must so remain until amended by proper authority. If the law or the constitution has been so inconsistent and illogical as to take up one class of objects and aid and foster them, and leave another class precisely like them unprovided for, the courts cannot so amend the law as to make it consistent and logical. That does not fall within the scope of judicial authority. But if the courts do attempt to so amend the law, will they *repeal* the law authorizing aid to railroads, or will they *amend* the law so as to give aid to stage coaches, hacks, drays, etc.? Either would make the law consistent. We do not admit, however, that there is any inconsistency in the law in this respect. On the contrary, we claim that there is a broad distinction between railroads and any other business of a purely private character.

We can suggest, however, a more exact parallel, a closer analogy, than any that has yet been suggested, and still it will not be claimed by the plaintiffs in error that it proves anything in their favor. Of all the different kinds of strictly private business that exist or may be imagined, that of a strictly private railroad corporation, such as we have heretofore supposed might be organized under the authority of the legislature, would come nearest in similitude to that of a *quasi* public railroad corporation, such as are actually organized; and yet the dissimilarity between the two corporations would be just great enough to destroy the desired inference sought to be drawn from their resemblance. We will admit that the strictly private corporation would not be entitled to receive public aid, but that does not at all prove that the *quasi* public corporation would be in the same condition.

There has been a half-expressed, half-suppressed, claim that the right of eminent domain is not exercised in favor of railroad corporations because of their public character, but that it is exercised under the maxim, *Sic utere tuo, ut alienum non lædas*. This is comic as well as novel. Because a man must so *use and enjoy* his own property as not to injure the rights of others, it is claimed that

Commissioners of Leavenworth County v. Miller.

he must be totally deprived of its use, and must allow a *strictly private corporation* (as is claimed) to take possession of it, and use and enjoy it.

It is also claimed that the taxes must be duly apportioned, and the district taxed must have a special interest in, and be specially benefited by the thing for which the taxes are levied. This is admitted; but still the government has a very broad and extensive discretion in the matter. The most that the legislature can do is to adopt the best rules within their power for the apportionment of the taxes. And these rules, however good, will sometimes be found to work injustice and hardship. No system has ever yet been devised, and the wisdom of man will probably never be able to devise, a system of apportionment that will do exact justice to every individual and to every locality. In cases of local improvements, or improvements that confer local benefits, the best system for securing the rights of the locality to be taxed that has yet been tried, is to let the locality itself say how much the benefit is worth and therefore how much it is willing to be taxed for it. Under such a rule, the locality taxed can certainly have no right to complain. This rule has been adopted in the present case, and the county of Leavenworth has declared how much she thinks the benefit is worth to her, and the amount for which she is willing to be taxed.

In cities where street improvements are made, a street anywhere in the city is considered of such a public benefit to the whole city that the whole city may be taxed for any improvements made thereon. And it is also considered of such a special and local benefit to each individual owning property adjacent thereto, that he may be taxed for the entire cost of the improvements made in front of his own property. *Hoyt v. Saginaw*, 19 Mich. 39; *Hines v. Leavenworth*, 3 Kas. 186; *City of Leavenworth v. Mills*, 6 id. 228.

A railroad built anywhere in the State is a public benefit to the whole State, and upon the same principle as taxation for street improvements, in the absence of any constitutional restrictions, the whole State could be taxed for its construction; and as each locality is also specially benefited by the improvement, there seems to be no good reason why it, instead of the State, should not be taxed to the extent of that benefit. Such has been the practice in nearly all the States of this Union. (See the numerous decisions heretofore cited.) On the continent of Europe, where railroads are generally constructed and owned by the government, we understand that both

Commissioners of Leavenworth County v. Miller.

systems of taxation are considered legal. The whole State may be taxed to build the road, or the localities through which it is located may be taxed to build it. The question in this case is presented in its simplest form. It is not proposed to overrule, but to enforce the will of those to be affected. The road passes through the county proposed to be taxed, though it also passes beyond the limits of the county and through many other counties. The aid is not a donation, but it is a subscription to the stock of the road, giving to the county an interest in, and a share of, the control of the corporation. The tax is not imposed by others upon the county, nor by the county upon others than its members, nor by the county on a portion only of its community; but it is imposed by the county on itself. In the case of *The City of Aurora v. West*, 9 Ind. 74, 82, the supreme court of Indiana, speaking upon the point now under discussion, and the power of a city to aid a railroad extending beyond its limits, used the following language: "It is true the water-works may benefit nobody but the citizens of the city, while the railroad may benefit the surrounding country to some extent; at the same time it confers a great local benefit on the city; one, perhaps, greater than the water-works. But where such is the case, should the city be deprived of the right to benefit itself locally, because it cannot do so without also benefiting others? And if the argument is a good one that cities are necessarily incapable of aiding any improvement that may extend beyond the corporate limits, will it not apply with equal force to States? May it not be said that a State is created to govern within its territorial limits, and hence that it is unconstitutional for it to aid any work extending beyond those limits? That Indiana, therefore, could not aid in the construction of the Wabash and Erie canal, because it extended into Ohio; that she could not, with the consent of Ohio, construct that portion of the Whitewater canal lying in that State because it was without her territorial limits; that South Carolina could not aid in the construction of a railroad to Memphis, in Tennessee, or to New Orleans, in Louisiana. But is this the doctrine? A State can do what its constitution does not, by positive provision or reasonable implication, prohibit. The United States and city corporations can do only what their constitutions permit. If the constitution of the United States expressly authorized the government to construct, with the consent of the States, roads within their limits, would there be any doubt of their power to do so? If a State, then, can

construct by permission — if South Carolina can, with the consent of Tennessee, construct a road in that State — cannot a city of a State be authorized by the State to take stock in a road extending beyond her corporate limits?"

We have conceded that taxes can only be levied for a public purpose. But who is to determine what is a public purpose, or when the public exigencies require that a tax shall be levied, we have not discussed, and do not propose to discuss in this case. That it rests largely in the discretion of the legislature, and that the courts have but little to do with the question, we think must be clear beyond all doubt. Judge COOLEY says that "Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion, which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, or where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful." Cooley's Const. Lim. 129, 488. As to what is such a public benefit that it may be aided by the public, seems to be a question of public policy — of political economy, which must almost exclusively be determined by the legislature. And when the legislature have determined the question — when they have determined that a certain thing is of such great public benefit, that it is public policy to aid it by taxation, if the courts may still say that such is not public policy, and for that reason declare the act of the legislature unconstitutional, the courts must possess almost despotic power. If such is correct doctrine, then there is an appeal from the legislature to the courts on mere questions of policy.

The ancient and venerable rule of *stare decisis* also requires that we should declare in favor of the power of the legislature to grant municipal aid to railroad companies. Twice this court has already so decided, and each time by an unanimous court. These decisions have been published by legal authority, and have become rules of property, and precedents for future decisions. In the first case, which was decided in 1864, the present chief justice delivered the opinion of the court. *Burnes v. Atchison*, 2 Kas. 454. In the second, which was decided in 1865, Chief Justice CROSIER delivered the opinion of the court. *Atchison v. Butcher*, 3 Kas. 104.

Commissioners of Leavenworth County v. Miller.

Several other cases have been decided in this court, in which it seems to have been assumed without question that such acts were valid.

We might also state here, that not only the great weight of authority in the United States is in favor of the validity of such acts as the one we are now considering, but also the more recent decisions are likewise in favor of the validity of such act. The Michigan case, already referred to, is the last decision against such validity, while the following cases, decided since the Michigan case, are in favor of their validity. *Stewart v. Supervisors of Polk Co.*, 30 Iowa, 9; 1 Am. Rep. 238; *Langhorne v. Robinson*, 20 Grat. 661; *Danville v. Railroad Company*, 43 Vt. 144; *The Lafayette, Muncie & Bloomington R. R. Co. v. Geiger*, 34 Ind. 185; *King v. Wilson*, 3 Chicago Legal News, 137; 1 Dillon's Cir. Ct. Rep. 555; *Stockton & Visalia R. R. Co. v. The Common Council of Stockton*, 41 Cal. 147.

V. There are three other questions attempted to be raised in this case: *First*, it is claimed that a vote of the people of Leavenworth county on the question (in substance) whether the commissioners of said county should issue \$250,000 of the bonds of said county, to be expended in the stock of the Union Pacific Railway Company, eastern division, which was carried in the affirmative, was not sufficient to authorize the said commissioners to make said subscription and to issue said bonds, as they did, in payment therefor. We think it was. *Second*, it is claimed "that such bonds shall be issued only in payment of assessments made upon all the stock of such railroad company." This is admitted. And while it does not appear that any formal order was made upon the records of said railway company making any assessments, yet all the stock that was issued by the company to any person or county was full-paid stock. This answered substantially the requirements of the law. *Third*, it is claimed that the commissioners on the part of the county had done all they could do to pay this bond, and therefore that the county was not liable. The reverse of this is true, and therefore this question is not in the case.

The judgment of the court below is affirmed.

KINGMAN, C. J., concurring.

NOTE.—BREWSTER, J., did not sit in this case; but in the case of *The State v. The Commissioners of Nemaha Co.*, argued in connection with the foregoing case and decided on the opinion therein, he delivered a lengthy dissenting opinion.

BOND V. WILSON.

(8 Kans. 228.)

Return — of service of process when may be impeached.

The sheriff's return on a summons was that he had served it by leaving a copy thereof at the usual place of residence of the defendant. On a motion to set aside the return, *held*, that evidence was admissible to show that the place where the summons was left was not the defendant's residence.

SUIT by Bond against Wilson to foreclose a mortgage. The sheriff made return on the summons that he had served it by leaving a certified copy "at the usual place of residence" of the defendant. The defendant appeared specially, and moved to quash and set aside said return. The opinion states the other facts. The court below sustained the motion and plaintiff excepted.

M. V. Voss, for plaintiff in error.

KINGMAN, C. J. The sheriff's return on the summons in this case is, that it was executed "by leaving a copy thereof at the usual place of residence of the defendant." A motion was made to set aside the return. On this motion an affidavit was read which shows that the defendant is a non-resident, and had been for several months before this action was commenced, and had no residence in this State; that the copy of the summons was left at the house of the father of the defendant, who makes the affidavit. The court set aside the sheriff's return.

Can a sheriff's return be thus shown to be false? This is a subject much discussed in this country by the courts, and no uniformity of decision is to be found. It is a general rule of the English common law that the court will not try the truth of an officer's return on a motion to set aside the proceedings, but the party must resort to his action against the sheriff for false return. Comyn's Dig., *Return*, F, 2. The English rule is convenient, and under the practice there is not open to the objections that lie to it in this country where the statutes have made such radical changes in process as well as in practice. At common law the action was commenced by a service of the writ by the officer. The declaration was after-

Bond v. Wilson.

ward served by delivering a copy, and this service was to be proved by affidavit; and unless special bail had been taken, the personal service of the declaration was necessary. Com. Dig., *Ret., Pleader C*, 1. Nor would a declaration be delivered till the defendant appeared or was in custody. Com. Dig., *Pleader, C*, 2. Under such a system a judgment without actual notice was almost an impossibility, and the rule as to the conclusiveness of the officer's return was founded in convenience, without likelihood of its working injustice. In the systems of practice adopted in this country, the safeguards being removed, it has become necessary to adapt the rule to the altered condition of the law. The sheriff not only executes original process by service upon the defendant personally, but by leaving a copy at his usual place of residence. The sheriff also determines whether a minor is over fourteen years of age, and serves accordingly. He also determines who is president, mayor, chairman, or chief officer of a board of directors; and also what is the usual place of business of a corporation, and who has charge thereof, and serves his process accordingly. Is his determination of such questions final? Must the defendant suffer the judgment to stand in such cases, and resort to his remedy against the officer? It must be borne in mind that no rights of third parties have intervened, but the only parties interested are before the court. The controversy is material, involving questions vital in their character, and going directly to the jurisdiction of the case. We find upon examination that the courts have generally held the sheriff's return on *mesne* and *final* process conclusive between the parties and privies, though this is by no means a rule of universal application; but that in cases of *original process* there has been a general disposition to let in the truth. This is still more necessary under article 4 of our Code. Without further discussion we will refer to some of the adjudged cases to show that the original doctrine is much modified to correspond to the changes in our practice. In Connecticut the courts have always held the rule to be that the sheriff's return was only *prima facie* evidence. *Watson v. Watson*, 6 Conn. 334. In New Hampshire a case precisely like the case at bar arose, and the defendant was allowed to show the falsity of the sheriff's return, as was done in this case. *Wendell v. Mugridge*, 19 N. H. 112. In *Rowe v. Table Mountain Water Co.*, 10 Cal. 441, it was held the return of the sheriff that the persons on whom the summons was executed were the president and secretary of the company

was *prima facie* evidence that they were such officers, and in the absence of any showing to the contrary allowed the judgment to stand. In *Carr v. Commercial Bank of Racine*, 16 Wis. 50, the sheriff's return was served on "H. S. D., President," and judgment was taken by default. Upon affidavits showing that H. S. D. was not president or any other officer of the bank at the time of service, the judgment was set aside as rendered without first having jurisdiction of the person. See also *Smith v. Law*, 5 Ired. 197; *Cunningham v. Mitchell*, 4 Rand. 189; *Freean v. Cruikshanks*, 3 McCord, 84; *Fleece v. Goodrum*, 1 Duvall, 306; *Castner & Hinckley v. Symonds*, 1 Minn. So far the authorities go. Our Code has liberal provisions to prevent the multiplicity of suits when the matter in controversy can be settled in one action. In the course taken with this case, in the court below, the action was direct to settle the question in dispute, and was in the precise spirit of the Code. To have refused to hear the affidavits and give judgment against a party not served, and drive him to an action against the sheriff for a false return for his redress, would neither have been justice nor in accordance with the Code.

We are aware it is a question of evidence and not of pleading; but we know of no statute that makes a sheriff a final and exclusive judge of where a man's residence is, or what is the age of a minor, or who are the officers of a corporation, or where their place of business is; and when the statute made it the duty of the sheriff to ascertain these facts it did not make his return of such facts *conclusive*. Of his own acts his knowledge ought to be absolute, and himself officially responsible. Of such facts as are not in his special knowledge he must act from information, which will often come from interested parties, and his return thereof ought not to be held conclusive. How it may be on mesne and final process we need not determine. In such cases both parties are in court and can have amendments to return made if the sheriff is convinced of his error. We only determine just the case before us. We think the court decided correctly, and the judgment is affirmed.

All the justices concurring.

State v. McCord.

STATE V. MCCORD, appellant.

(8 Kans. 232.)

Criminal law—twice in jeopardy — New trial.

A statute provided that "the granting of a new trial places the parties in the same position as if no trial had been had." Defendant was convicted of manslaughter, on an information charging murder; and a new trial was granted on his own motion. *Held*, that the defendant had waived the constitutional safeguard against being twice put in jeopardy for the same offense, and that on the second trial he could be convicted of murder. (*See note, p. 473.*)

INFORMATION charging Ethan McCord with murder in the first degree. Plea, "not guilty." On the trial the defendant was convicted of manslaughter in the third degree. On defendant's motion the verdict was set aside and a new trial granted.

On the second trial, under the charge of the judge which is fully stated in the opinion, the jury returned a verdict of "guilty of murder in the second degree," and the defendant was sentenced to ten years in the penitentiary. From this judgment defendant appealed and assigned several errors, only one of which is of any general importance.

B. F. Simpson and R. B. Mitchell, for appellant.

E. F. Smith and W. R. Wagstaff, for the State.

KINGMAN, C. J. [after deciding some questions of practice.]
III. The charge objected to is in these words: "The defendant being charged in the information with murder in the first degree, you may, if in your opinion the evidence warrants the same, find him guilty of murder in the first or second degree, or of any one of the several degrees of manslaughter, or of an assault only."

The objection to this charge arises from the peculiar *status* of the case, and not from any inherent impropriety in the charge itself as applied to cases generally. The accused had been before tried on the same information, and had been found guilty of manslaughter in the third degree. On his motion a new trial was granted, and

on the new trial the verdict was for murder in the second degree. It is contended that on the second trial he could not be convicted of a higher degree of the crime of which he was charged than that of which he was found guilty by the verdict on the first trial. The argument in support of this position may be briefly stated as follows: The verdict of "guilty of manslaughter in the third degree," on the first trial, was a verdict of not guilty as to all the higher degrees of the offense than the one of which he was found guilty; that when he moved for a new trial he only moved for a new trial of the issue as found against him, and therefore only waived the constitutional guaranty that he should not be twice put in jeopardy for the same offense, so far as was necessary to obtain a new trial, and that it was not necessary to, nor did he waive that constitutional right except as to the issue found against him, and not on those degrees of the offense of which by the verdict he was inferentially acquitted. In support of this reasoning counsel refer to *Brennan v. The People*, 15 Ill. 511; *Hunt v. State*, 25 Miss. 376; *People v. Gilman*, 4 Cal. 376; *State v. Ross*, 29 Mo. 35; *Jones v. The State*, 13 Tex. 184; *Lithon v. The Commonwealth*, 2 Va. Cases, 311; *Slaughter v. The State*, 6 Humph. 410; *Campbell v. The State*, 9 Yerg. 333, and *The State v. Tweedy*, 11 Iowa, 350. These cases, and some others from the same States, seem to support the doctrine for which the appellant contends. A contrary doctrine is maintained in *The State v. Commissioners*, 2 Hill (S. C.), 273; *The State v. Morris*, 1 Blackf. 37; *United States v. Harding*, 1 Wall. Jr. 127. And the absence of decisions in the older States upon the point may be suggested as showing that the theory is one that has only of late years found its way into our jurisprudence.

The power to grant a new trial in criminal cases constituted no part of the jurisdiction of the court at common law. In this country the courts have assumed and exercised with great uniformity the power of granting new trials in criminal cases. It is said, and so far as our researches extend it is true, that there are but two reported cases that deny this power: *The People ex rel. Case v. The Judges, etc.*, 2 Barb. 282, and *United States v. Gilbert*, 2 Sumn. 19. This power to grant new trials is in some States conferred by express legislation. In others the courts have assumed the power in the interests of justice and public safety, as was done in Massachusetts in *Com. v. Green*, 17 Mass. 532. In other States its origin is found in the law organizing the court. *People v.*

State v. McCord.

Munson, 1 Parker's Cr. 625. In every case where we have seen the question discussed, it is assumed as a power conferred by legislation or by long usage. And in no case is it held to be a constitutional grant. It is a *privilege* offered by the law to the accused, in addition to the *guaranties* afforded by the constitution. As the power is conferred by law, it is competent for the law-making branch of the government to extend it, or to limit and modify it, at its pleasure, or to prescribe upon what terms it may be granted, so that it does not infringe upon any constitutional guaranty. In this State the terms are prescribed by law. In the Code of Criminal Procedure are these provisions:

"SEC. 270. A new trial is a re-examination of the issue in the same court."

"SEC. 274. The granting of a new trial places the parties in the same position as if no trial had been had. The former verdict cannot be used or referred to, either in evidence or argument."

The plain reading of these sections is conclusive of the whole matter under discussion. A critical examination of the sections does not change the result. A re-examination of the issue is to again examine it. The issue is the issue on the record, as it is there made up. It consists of the charge of the offense in all its degrees, as set out in the information, on the part of the State, and the plea of "not guilty," which is a denial of each and all the allegations of the information, on the part of the defendant. Such is the issue on the record, and the only issue in the case. It was the issue tried, and the issue to be re-tried, or, in the words of the statute, to be re-examined. The statute uses the words "*the issue*," not some part of the issue that may be ascertained by judicial construction — but *the issue*. Section 274 is quite as plain, and as if to guard against any misinterpretation, declares that the granting of a new trial places the parties in the same position as if no trial had been had. This is clear and conclusive. The very essence of the argument in favor of the rulings contended for by counsel for appellant is that the new trial places the party in a very different position from what he would have occupied if no trial had been had.

The statute and the decisions cited are in direct conflict. The decisions are but evidence of what the law is, in absence of express statutory regulations, and cannot be used to overturn the law. Nor does our law conflict with any principle asserted in these decisions,

as can easily be shown. Three propositions are asserted. 1. That a verdict of acquittal or conviction is a perfect bar to another prosecution for the same offense, and this is a constitutional guaranty, of the benefit of which neither courts nor legislatures can deprive a party. 2. That a party may waive this constitutional safeguard, and that he does so when on his own motion he obtains a new trial. 3. That he waives this right only so far as may be necessary to obtain the new trial; and that it is only necessary to waive this right to so much of the verdict as finds him guilty of a certain degree of the offense, and not to that part that inferentially finds him not guilty of the other degrees. The first two of these propositions are admitted by all the authorities. As to the third, there is some contrariety of opinion, upon which it is not our purpose to comment. For, assuming all the propositions to be correct in the absence of statutory regulations, and the result is not affected in this State, where, as we have seen, the legislature had a right to make a law, and where they have made one, that measures the extent of the waiver, and fixes its necessity. The authorities all agree that the constitutional right may be waived by the party convicted, and that this waiver is commensurate with the necessities of the party, in order to obtain a new trial. Whatever may be the proper rule as to the extent of the waiver where there is no statute, it is plain that where the statute has fixed the necessity, it has also there placed the extent of the waiver. In this State the necessity is that the party should waive the entire right so as to bring himself within the power of the court to grant him a new trial. His waiver goes no farther than his necessities. He makes his motion with a full knowledge of the risks he takes, and of all the possible consequences. To obtain a new trial, he voluntarily waives a right that neither courts nor the legislature can take from him — a right that he surrenders for his own benefit, and the exact extent of which was plainly written, as the terms on which it could be done, when his motion was allowed. He is estopped from now complaining. He has been unfortunate, but such a result must sometimes follow any new trial, even on the theory contended for by appellant, though the misfortune may not be so great.

We are aware that the decision in the case of *The People v. Gilman*, 4 Cal. 376, was made under a law similar to our own, and such may be the fact in some of the other States. If so, they must hold the law unconstitutional; and before the decisions are convino-

State v. McCord.

ing, they must show them to be so. The law is admitted to be constitutional in the California case, and is then construed away by reasoning that violates every well-established principle of construction, and holds that if it is to be understood as it is written it is unconstitutional, but fails to show how. We are not convinced by the case. We believe the law to be constitutional. By its terms it is decisive. The judgment is therefore affirmed.

All the justices concurring.

NOTE.—In *State v. Martin*, 11 Am. Rep. 567 (30 Wis. 216), the defendant was tried upon an indictment for murder and was found "not guilty of murder, but guilty of manslaughter in the second degree." Upon a new trial upon the same indictment, granted upon his own motion, held, that he could not be convicted of murder. The case of *People v. Gilmore*, 4 Cal. 376, seems to be more in accordance with the authorities and with the correct principles of construction, as we understand them, than is the principal case, notwithstanding the strictures made upon it therein. The constitutional provision and the statute of California were similar to those of Kansas. The opinion of the court was as follows:

Ch. J. MURRAY delivered the opinion of the court; Mr. Justice HAYDENFELDT concurred.

The appellant was indicted for murder. On the trial, the jury rendered a verdict of guilty of manslaughter, which was afterward set aside on the prisoner's motion, and a new trial ordered. On the second arraignment of the prisoner upon the indictment, he pleaded a former acquittal.

The questions presented are:

- 1st. The prisoner having been convicted of manslaughter, can he, on a second trial, be compelled to answer to the charge of murder? And,
- 2d. Admitting that he cannot, whether the prisoner can be again tried for manslaughter, inasmuch as the indictment against him is for the crime of murder?

A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty.

The reason is obvious: if such were not the case, the party, after undergoing punishment for manslaughter, might be arraigned and tried again for murder, notwithstanding he had been compelled to answer this charge upon the first trial, and the jury had passed upon the same.

The jury in such a case, in contemplation of law, render two verdicts: the one acquitting him of the higher crime; the other convicting him of the inferior. They must first determine his guilt or innocence upon the charge made by the indictment before proceeding to inquire whether he is guilty of an inferior crime. The verdict of manslaughter is as much of an acquittal of the charge of murder, as a verdict pronouncing his entire innocence would be, for the effect of both is to exempt him from the penalty of the law for such crime." *Hurt v. State of Miss.*, 25 Miss. 373.

It is contended, however, in opposition to this position, that the new trial is in consequence of the prisoner's own act, and that he voluntarily subjects himself to the risk of a conviction for murder, by applying for such new trial."

The case has been likened to one where the judgment is arrested for some irregularity or informality, on the application of the prisoner. There is a wide difference between the two cases; in the latter the verdict is against the prisoner, while in this case it is in his favor. There is no authority to be found which enables a party or the court, in a case where the prisoner has been acquitted of an alleged crime, to arrest the judgment and re-try the cause.

State v. McCord.

The acquittal would operate as a bar to all further proceedings, and the party, if insane enough to ask again to be put upon trial, would be met by the answer, that the court had no longer any jurisdiction over him. I shall assume, that the court below possessed the inherent power of awarding a new trial in this case, and that the statute is only a limitation on the power of said court, as to the cases in which it may be exercised. The 439th section of the Criminal Code reads as follows: "A new trial is a re-examination of the issue in the same court, before another jury, after verdict has been given. It places the parties in the same position as if no trial had been had," etc., etc.

It is contended that this section is conclusive of the whole case. It is, however, susceptible of another reading; and one more in consonance with the humane and enlightened spirit of the age, as well as of our jurisprudence. I understand it to mean the *issue in controversy*, not the one that has been settled by the jury and found in favor of the defendant; and I understand the words, "placing the parties in the same position that they occupied before the trial," as simply applying in reference to the issues undisposed of. The section, at best, is a crude definition of a new trial and by reference to the act. It will be seen that the legislature does not purport to give to the courts the power of granting new trials, as a new and distinct power not belonging to them by virtue of their original jurisdiction, but only to limit the exercise of an acknowledged authority.

That I am correct in my construction of this section, to my mind is evident, from the fact that the legislature could not have intended, where a man had been improperly convicted of a minor offense, to subject him to the risk of being convicted of a greater one. If such a rule be established, no man will subject himself to the risk of being hung for murder, when convicted of manslaughter, and will prefer, in many instances, although innocent, to rest under the conviction than to encounter the danger of a second trial. In every case where the timid and unfriended are involved, this will be found to be the result; and in times of high popular excitement, those who may be bold in the consciousness of their innocence, will hesitate before they voluntarily assume so great a risk and pay so fearful a premium for the privilege of asserting that innocence.

Again: The prisoner is either absolved from the charge of murder, and entitled to a new trial on the charge of manslaughter, or he is not entitled to a new trial at all. The constitution of this State has provided that "no person shall be subject to be twice put in jeopardy for the same offense." Now, if I am right, that a conviction for manslaughter is an acquittal for murder, it must follow that any law that would compel a party to be retried for murder, in order to escape the minor offense, thereby putting the party in jeopardy, is in conflict with this provision of the constitution.

It has been urged that the party voluntarily put himself in this jeopardy. Such is not the case. The act, if we are to give it the construction contended for on the part of the State, takes from the party a right which he before possessed, and necessarily subjects him to a second jeopardy, if he wishes to maintain that right, or assert his innocence. This is a subjection by operation of law, and not act of the party; and if it were otherwise, I have shown that no party can voluntarily subject himself to, a second trial after an acquittal, and the courts have no jurisdiction over him.

These principles have been fully settled by the supreme courts of Mississippi and Tennessee, in the cases of *Hurt v. State*, 25 Miss. and *Slaughter v. The State*, 6 Humph. 411.

I know of but one case in which a different rule has been held, viz., by Mr. Justice GRIER, in a case before the United States circuit court, in Philadelphia, in 1848.

The address of the learned judge to the prisoners in that case seems to have been prompted more by the feelings natural to the occasion than from a correct opinion of the law, and as it is unsupported by any authority or argument, may be considered as mere *dictum*.

The only difference between the cases cited from Mississippi and Tennessee, if any exist (and it does not appear from the report of those cases), is, that there were distinct and separate counts in the indictment both for murder and manslaughter while, in the present case there is but one count, and that for murder. This consideration has been urged upon the court, and it has been ably argued that, if the prisoner

Union Pacific Railway Co. v. Nichols.

cannot be re-tried for murder, there is no indictment on which he can be arraigned and tried for manslaughter, and, therefore, he must be discharged.

In the case of *Campbell v. State*, 9 Yerg. 333, it was held to be error, after conviction on one count of an indictment, and an acquittal on another, to re-try the party on both counts, upon the grounds which we have already alluded to. In *Indiana*, in the case of *The State v. Morris*, 1 Blackf. 37, it was held, that where one count includes a greater and a less charge (*e. g.*), burglary and larceny, and after acquittal of the greater offense, but no conviction of the lesser, a new trial is ordered, that the whole case is re-opened, and the defendant subjected on the second trial to the double charge.

I have been unable to obtain the latter case, and am, therefore, ignorant of the reasons on which the decision was based. Whatever they may have been, I do not see how such a decision could be maintained on principle.

If, however, there be any well-settled ground of distinction between a case where the indictment contains several counts and where it contains only one, that difference is obviated by our statute, which specially provides that "the indictment shall charge but one offense," and further, that "the defendant may be convicted of any offense, the commission of which is necessarily included in that with which he is charged in the indictment," etc. An indictment by operation of law for murder, is also an indictment for manslaughter, and every less offense that may be included under the charge of murder, just as much as though it were charged in distinct and separate counts.

We are of opinion that the appellant is now liable, and should be tried for manslaughter on the indictment already found against him.

In regard to the last point raised by the appellant, viz., that the district court has no jurisdiction over the case of the prisoner, we do not consider it worthy of serious consideration, as the legislature possessed the undoubted right to transfer the criminal business of the court of sessions to the district court; and the 439th section of the Criminal Code cannot be regarded as a guarantee of any right to the prisoner to be again tried before the court of sessions or as a limitation on the power of the legislature to change the forum.

The judgment of the court below is reversed, and the cause remanded, with instructions to the district court to try the prisoner for manslaughter in conformity with this opinion." — REP.

UNION PACIFIC RAILWAY CO., plaintiff in error, v. NICHOLS.

(8 Kans. 506.)

Passenger carriers — who are not passengers.

An express company had, by contract with a railroad company, the use of a car in which their agent rode without paying fare. The agent, without the authority of his employers, took the plaintiff with him in the car for the purpose of teaching him the business, and the conductor, supposing plaintiff to be an agent of the express company, suffered him to ride without paying fare. An accident happening, plaintiff was injured. *Held*, that plaintiff was not a passenger, and could not maintain an action against the railroad company.

ACTION to recover for injuries. The opinion states the case.

J. P. Usher, E. W. Dennis and Martin, Burns & Case, for plaintiff in error.

Clough & Wheat, and T. P. Fenlon, for defendant in error.

VALENTINE, J. This was an action by Nichols to recover for injuries alleged to have been committed by the railway company. The petition of the plaintiff set forth that there was a *contract* between the parties; that the defendant undertook to carry the plaintiff as a *passenger* in a car *used* among other things *for that purpose*, from the State Line near Kansas City to and beyond Monument Station, for a certain *hire and reward*, and that while so carrying the said plaintiff the said injuries were caused through the negligence of the agents and servants of the defendant. But the said petition was not true, and there was no evidence to sustain some of the most material portions of it. We have all the evidence before us, and from that it unquestionably appears that there was *no contract* entered into between the plaintiff and the railway company; the plaintiff was not a *passenger*, within the true legal signification of the term; he did not get into or ride in any *passenger car*, and he did not pay or agree to pay any *hire or reward* for his passage. The only connection that the plaintiff had with the railway company was as follows: He went on the train without purchasing any ticket, not into any passenger car, but into the baggage car, and into that portion of the baggage car which was used and occupied exclusively by the United States Express Company for their business, and remained there until he received the injuries of which he now complains. When the conductor of the train met him in the baggage car, he did not offer to pay his fare, but allowed himself to be introduced to the conductor as an express messenger. He was so introduced by Porter Warner, who had been, up to that time, and then was, in fact, the regular express messenger for that train. And Warner also represented to the conductor that he "was learning Nichols the run." During the trip the plaintiff acted as express messenger, having the keys, and assisted Warner in handling and delivering the freight of the express company. The conductor, supposing the plaintiff to be an express messenger, and therefore entitled to ride in the baggage car, and to ride free, or rather supposing that his fare was paid or arranged for by the express company in their contract with the railway company;

Union Pacific Railway Co. v. Nichols.

allowed him to ride in the baggage car, and collected no fare from him. The conductor made no contract with the plaintiff, but allowed him to ride on the contract made between the plaintiff's supposed employer, the express company, and the conductor's employer, the railway company. The conductor supposed that the plaintiff was riding in the baggage car, and free, by authority as high as that under which he himself acted, and by an authority which he had no power to revoke. The conductor therefore did not attempt to confer upon the plaintiff any right to ride upon that train, but simply left the plaintiff with the right which he supposed the plaintiff already had, independent of any authority from himself. But the plaintiff had no such right, nor any right there. He was not an express messenger, nor was he in the employ of the express company in any manner whatever. He was there simply by a private arrangement between himself and Warner, and one McNaughton, an agent of the express company at the State Line, "for billing and transferring and delivering goods for the express company." He was there simply learning the route, so that he might be able to take the place of Warner during Warner's absence. But he was not there by any authority of the express company. Neither Warner, nor McNaughton, nor both together, had any authority to put him there. None but the president, vice-president, or general superintendent of the express company had any such authority, as is shown by the evidence. But the plaintiff did not even have the authority or consent of the local superintendent of the express company. Therefore he had no right whatever on said train.

Before proceeding further, perhaps it would be proper to state that the said baggage car ran off the track and was upset, about three miles east of Monument Station, because of a "low joint" in the rail, and injured the plaintiff and one or two others; that "none of the passenger coaches went off the track, so as to injure the coaches or any passengers;" that there were only about twenty passengers on the train during that trip, and that "there was room in the passenger cars for some fifty or sixty more passengers than were on the train;" that "the rules of the company prohibited passengers from riding in the express, mail, or baggage cars;" that the plaintiff was so injured as to impair his mind; and that the verdict of the jury and the judgment of the court were in favor of the plaintiff for \$22,500.

Union Pacific Railway Co. v. Nichols

Now, so far as the argument or the decision of this case is concerned, it will be admitted that all the rulings of the court below were correct if the plaintiff had been a *passenger* within the true sense of that term. Also, that a regular express messenger is a passenger entitled to receive the same care as any other passenger, so far as the same can be exercised toward him, although nothing be paid for his transportation except what the express company pays to the railway company for transportation generally of their freight and agents. Also, that any person may be a passenger, entitled to all the rights and privileges of other passengers, without the payment of any fare, if he be on the train with the intention of being a passenger, and with the consent of the company or its officers, provided said consent be obtained without any fraud, or provided said company or its officers have a full knowledge of all the facts. Also, that a regular passenger may be allowed by the conductor the privilege of walking through the cars, or getting on the platform, or into the baggage car, without forfeiting any of his rights as a passenger. And also, that the obligations of common carriers of passengers do not rest wholly or even mainly upon contract, but principally upon the laws of the State in which such carriers do business. But it will not be admitted that any and every person who may enter a car or go upon a train is a passenger, or entitled to all the rights and privileges of a passenger. The employees of the railway company are not passengers, although they may do more riding upon the road than any other class of persons. See the numerous decisions concerning the liability of railroad companies for injuries done to their employees through the negligence of other employees: *Shearman and Redfield on Negligence*, 101 to 127, ch. 6, and cases there cited; 1 *Redfield on Railways*, 520 to 537, and cases there cited. Where employees ride upon the road in consequence of their employment, and as employees, paying no fare, they are not passengers, although they may at that time, and on that particular train, not be performing any service for the company. *Higgins v. H. & St. Jo. R. R. Co.*, 36 Mo. 418, 432 *et seq.*; *Gilshannon v. Stony Brook*, 10 Cush. 228; *Seaver v. Boston & Ma. R. R. Co.*, 14 Gray, 466; *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134. A person who enters the cars to see a friend safely seated is not a passenger. *Lucas v. New Bedford R. R. Co.*, 6 Gray, 61. A person who rides upon the engine of a train with the consent of the engineer, but contrary to a rule of the company, of

Union Pacific Railway Co. v. Nichols.

which he is informed, is not a passenger. *Robertson v. N. Y. & E. Railway Co.*, 22 Barb. 91. And generally, whenever a person goes upon a train or on any part of the train without authority, he is not a passenger. *Moss v. Johnson*, 22 Ill. 633. It is probably true that the obligation of a common carrier of persons does not rest wholly or even mainly upon contract, but still no person can become a passenger except by a contract either express or implied. "A passenger is a person who *undertakes* with the *consent* of the carrier to travel in the conveyance provided by the latter, other than in the service of the carrier as such." Shear. and Redf. on Neg. 292, § 262. It is true, that whenever a person who desires to become a passenger on a railroad does all that the law and the rules of the company require of him for that purpose, it will be presumed that the company has given its consent, and that the requisite contract has been made; for in such a case the company could not legally withhold its consent. But whenever it is shown that such person has not done what is required of him, no contract will be presumed. It will then devolve upon such person to show affirmatively that a contract has been made — to show affirmatively that the consent of the company has been given.

In the present case the plaintiff did not do what was required of him in order that he might become a passenger; he did not himself make a contract with the railway company, or any of its agents; and he had no right to ride under the contract made between the express company and the railway company. The consent obtained from the conductor was the consent that an *express messenger* might ride in the baggage car, and without paying his fare. Such consent did not apply to the plaintiff. But if it be said that the conductor applied it to the plaintiff, then it may be answered that it was so done under a misapprehension, induced by the plaintiff himself in allowing himself to be introduced to the conductor as an express messenger, and represented to be such, when in truth and in fact he was not such messenger. This was a legal fraud upon the conductor, and upon the railway company, whatever may have been the intentions of the plaintiff.

There was but little conflict in the evidence in this case — none upon the points we have been discussing. Therefore, whether the plaintiff was a passenger or not was purely a question of law. If he was a passenger, he was undoubtedly entitled to recover, for the railway company was unquestionably guilty of some negligence in

Deering v. Boyle.

allowing the track of the railway to get out of repair. Whether he was a passenger or not seems to have been considered by the court below as resting almost exclusively upon the moral intentions of the plaintiff. If the plaintiff honestly believed that he did right in doing as he did, or if he honestly believed that the circumstances of the case gave him the right to do as he did, then, according to the view of the court below, he was a passenger. But on the other hand, if he knowingly practiced a fraud and deception upon the conductor whereby he was allowed to ride in the baggage car without the payment of fare, he was not a passenger. This theory seems to have run through the whole charge of the court, and the whole case seems to have turned upon it. The court below, therefore, erred in its charge, in some of the instructions that it gave and in some of the instructions that it refused. We think, however, that it made no difference how honest the plaintiff was, nor how he viewed the transaction in its moral aspect.

For the reason that the court erred in charging the jury, and for the reason that there was no evidence to sustain some of the material allegations of the petition, the court also erred in overruling the defendant's motion for a new trial. The judgment is reversed and a new trial ordered.

KINGMAN, C. J., concurred.

BREWER, J., did not sit in the case.

DEERING, plaintiff in error, v. BOYLE.

(8 Kana. 595.)

Married women — liability on promissory note.

A married woman gave a promissory note in payment of her husband's debts, without, in terms, making it a charge upon her separate estate. *Held*, that an action could be maintained against her on said note and her separate estate applied in payment of the same.

ACTION upon a simple promissory note executed by Sarah Deering, plaintiff in error, a married woman. The opinion states the case.

Deering v. Boyle.

McComas & McKeighan, for plaintiff in error.

Hulett & Hill, for defendant in error.

VALENTINE, J. This was an ordinary action on a promissory note brought by Frank R. Boyle, plaintiff below, against Sarah P. Deering, defendant. The defendant answered to the plaintiff's petition as follows :

"Defendant further avers that said note was executed and signed by her while she was the lawful wife of one George M. Deering, and that said George M. Deering was, at the time of the execution of said note, indebted to said plaintiff, F. R. Boyle, and said note was given and executed by said defendant in payment of and satisfaction of the sole, separate and individual debt of said George M. Deering, and without any benefit or consideration whatever moving to said defendant."

The plaintiff demurred to this answer, on the ground that it did not state facts sufficient to constitute a defense to the petition. The court below sustained the demurrer, and the defendant as plaintiff in error now brings the case to this court.

That such a contract or promise as the one embodied in the said note would be void at common law, we suppose will not be questioned ; or that an action at common law could be maintained upon said note, we suppose will not be claimed. But these are not questions involved in this case, and therefore all the authorities that may be referred to in support of these propositions are wholly inapplicable to the case at bar. The real questions to be considered in this case are, whether said note would be held valid in a suit in equity to enforce its payment, or whether it is valid under our statutes. If considered valid in either case the plaintiff would undoubtedly have the right to recover in this action. If it be said, however, that this action is in form an ordinary action at law, we would answer that while that is not strictly true, yet it makes no difference, provided facts sufficient are stated to show a good cause of action as provided by our Code. The plaintiff's petition was drawn under section 123 of the Code, and is sufficient under that section. Under such a petition, if the plaintiff has any cause of action on the note, either in law or equity, he may recover ; and if the defendant has any defense, either in law or equity, it devolves upon her to state it in her answer. In this State, all distinctions

Deering v. Boyle.

between actions at law and suits in equity, and the forms of all such actions and suits are abolished, and in their place we have but one form of action called a civil action. Code, § 10. Both common-law and equity jurisdictions are vested in and administered by the same court. And whenever the rules of the common law and those of equity differ, as they probably do as applied to the note now in controversy, equity being the stronger jurisdiction the courts of this State must follow the rules of equity.

Could the plaintiff recover, in equity, on said note? It has been unquestionably settled in England, and pretty well settled in this country, that a married woman is regarded in equity, as to her separate property, as a *feme sole*, and her separate property is charged with all her debts and obligations without any *express* intention on her part so to charge it. For instance, whenever a married woman gives a promissory note it will be presumed in equity that she intends to charge her separate estate, unless the contrary be shown. The authorities are very numerous upon this subject, and most of them may be found cited in Mr. Bishop's work on the law of married women. 1 Bish. on Married Woman—Eng. authorities, §§ 848–858; Am. authorities, §§ 864–879. The doctrine as above stated was hardly questioned in this country until the decision of the case of *Yale v. Dederer*, in New York, in 1860. That case was first decided by the supreme court of New York, in 1855. 21 Barb. 286. It was then decided, in accordance with what was at that time generally, if not universally, understood to be the law both in England and in this country. Afterward the case was taken to the court of appeals, and reversed by a divided court: DENIO and ROOSEVELT, JJ., dissented, and STRONG, J., expressed no opinion. 18 N. Y. 265. Afterward it was again decided by the supreme court (31 Barb. 525), and again (in 1860) taken to the court of appeals and reversed. 22 N. Y. 450. At the time of this last decision by the court of appeals that court decided that where a married woman signed a note as surety for her husband, it would not charge her separate estate though so intended. This was hardly good law at the time it was so decided; and even the courts of New York have ever since been trying to get back to the true doctrine without expressly overruling this decision. In the case of *Owen v. Cowley*, 36 N. Y. 600, it was decided by the court of appeals, that "Where a charge is created by the express agreement of a married woman for a good consideration, though for a purpose not beneficial

Deering v. Boyle.

to her separate estate, she is bound in equity by the obligation she thus deliberately chooses to assume." In the case of *Ballin v. Dil-laye*, 3^d N. Y. 35, it was held by the court of appeals that "the separate estate of a married woman was chargeable in equity for any debt she might contract on the credit of or for the benefit of such estate." In the case of the *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; 1 Am. Rep. 601, it was decided in 1870, by the commission of appeals, that a married woman could charge her separate estate by indorsing on a promissory note given by her husband and others the following words, to wit: "For value received I hereby charge my individual property with the payment of this note. Armina Babcock;" — although this indorsement was made without consideration, without benefit to her separate estate, in a transaction in which she had no interest, except as a wife, and in which her husband had no interest, except a joint interest with others. The courts of New York, by these decisions, have placed themselves in the ludicrous position of declaring that in *equity* a married woman's contract does not depend for its validity upon any rules of equity or justice, but simply upon whether that portion of the contract which charges her separate estate is expressed in writing or not. The case of *Yale v. Dederer*, 22 N. Y. 450, was severely criticized in the case of *Corn Exchange Ins. Co. v. Babcock*, *supra*; and so it had previously been criticized and disapproved in the able and exhaustive opinion of Chief Justice DIXON, in the case of *Todd v. Lee*, 15 Wis. 365. Mr. Bishop, in his work on married women, says that the several differences of opinion upon this subject may be reduced to two.

And then he uses the following language: "On the one side is the doctrine that a married woman, who, in these transactions, cannot bind herself personally, is presumed, when she has a separate estate, if in form she contracts a debt but does not in express terms make it a charge on this estate, to be a scoundrel, meditating a cheat on the other party. She goes into a retail shop, for example, and looking at a dress, says, 'I will pay you for this,' and takes it away. What she gives is her promise. As a thing binding on herself, it is a nullity; but the shop-keeper thinks he is getting something of value, and so parts with his goods. He may know the woman is under coverture, but he knows also that she has a separate estate. She knows that she has no means of paying, except out of this separate estate, but by resorting to this she knows she has the means. Does

she intend to resort to this? If she does, she intends to charge it—she does in her mind charge it; she means to go to it, and she considers whether there will be enough left to buy another dress. But the judicial opinion now under consideration says, that though it is quite possible the woman may mean all this, it is also possible she may be meditating a cheat; therefore, the tradesman, to recover the debt as against the separate estate, must prove that when the woman bought the goods she was in an honest frame of mind. On the other hand, the opposite judicial opinion holds, that a married woman, like all other parties appearing before judicial tribunals, shall be presumed to be innocent until she has been proved guilty—honest-minded, until the contrary appears—and that she cannot herself allege her own guilt or fraud. Thus, this class of opinion carries the ordinary principles of the law into the law of married women.” 1 Bishop on Mar. Women, § 873.

When a married woman executes a promissory note, she of course means something. She either means to charge her separate estate, or else she means to cheat and defraud the person to whom she gives the note. Is it not more charitable to suppose she means the former? But suppose she means the latter, will *courts of equity* hear her plead her own guilt and fraud? If the contract of a married woman does not bind her separate estate, then of course it is a nullity, for it is well settled that it cannot bind her personally. But to give her contract such a construction violates at least two well-settled principles of law; first, it presumes her guilty of fraud, before the fraud is shown; second, it adopts a construction which will defeat the contract instead of adopting that construction which will prevent its failure, and give effect to the obligation of each and all the parties. We think the supreme court of Missouri has decided this question correctly. *Coats v. Robinson*, 10 Mo. 757, 760; *Whitesides v. Cannon*, 23 id. 457; *Segond v. Garland*, id. 547; *Schafroth v. Amos*, 46 id. 114, 116; *Miller v. Brown*, 47 id. 50. So also has the supreme court of Alabama: *Collins v. Rudolph*, 19 Ala. 616; *Collins v. Lavenberg*, id. 682; *Ozley v. Ikelheimer*, 26 id. 332; *Baker v. Gregory*, 28 id. 544; *Caldwell v. Sawyer*, 30 id. 283; *Cowles v. Morgan*, 34 id. 535. Also Kentucky: *Jarmin v. Wilkerson*, 7 B. Monr. 293; *Bell v. Keller*, 13 id. 381, 384, *et seq.* And see the following cases: *Greenough v. Wiggington*, 2 Greene (Iowa), 435; *Patton v. Kinsman*, 17 Iowa, 428; *McCormick v. Holbrook*, 22 id. 487; *Dobbin v. Hubbard*, 17 Ark. 189. Some or the

Deering v. Boyle.

cases relied on to show that a married woman cannot make a valid contract, charging her separate estate, are actions *at common law* in States where equity and common-law jurisdictions are kept separate and distinct. Of course such cases are not applicable in this State. Of this class is the case of *Jones v. Crosthwaite*, 17 Iowa, 393, referred to by counsel for plaintiff in error. In connection with this case, see the case of *Patton v. Kinsman*, 17 Iowa, 428. Another class of cases is where a married woman, at the time she makes the contract, appropriates a certain piece of property (either her's or her husband's) for the payment of her obligation, by way of mortgage or pledge, or the like. In such cases, it has been held that no other property was intended to be appropriated or charged, upon the maxim, that the express mention of one thing is the exclusion of another. Such was the case of *Johnson Co. v. Rugg*, 18 Iowa, 137, referred to by counsel for plaintiff in error. Of course this class of cases is not applicable to the case at bar. Another class of cases is where a court of equity, under the peculiar circumstances of the case then under consideration, there being fraud, overreaching, or an undue advantage taken of the woman's affections, frailties or infirmities, could not in equity and good conscience charge her separate property. Of course that class of cases is not applicable to this case. In another class of cases we don't think the law has been correctly laid down. Such is the case of *Yale v. Dederer*, 22 N. Y. 450, referred to by counsel for plaintiff in error.

The true doctrine seems to be this: Whenever a married woman enters into a contract (not for necessities) for the payment of money, she does not bind her husband nor her husband's property, nor herself personally; but she binds her own property which she holds separate from her husband.

It seems scarcely necessary for us to say any thing with reference to our own statutes concerning the rights of married women, except to say that they do not change the rules of equity so as to affect the decision of this case. But still it may not be out of place to offer a few suggestions concerning them. Section 2 of chapter 62, General Statutes, 563, reads as follows:

"SEC. 2. A married woman, while the married relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property."

Other sections provide that a woman may sue and be sued, as if she were sole, may carry on trade and business, perform labor or service, etc., on her sole and separate account; but section 2 is the one more directly involved in the consideration of this case; and in fact that portion of said section which provides that a married woman "may enter into any contract with reference to" her separate estate "in the same manner, to the same extent, and with like effect, as a married man may in relation to his real and personal property," is about all that we need consider. It is claimed that the note sued on is not a contract "with reference to" or "in relation to" the separate property of Mrs. Deering. That it has no direct reference to any specific article or portion of said property, will certainly be conceded. But if the great weight of judicial decisions in this country upon contracts made by married men, or other persons not under disability, is to have any force in the determination of this question, then it must be equally clear that such a contract as the note sued on has reference, more or less remote, to the general property of the person signing the same. If it has not such reference, then it has no reference to any thing whatever, but is totally and absolutely void. A married woman cannot, by her contract, bind herself personally, as a married man can, and therefore, if she does not bind her property by her general engagements, she does not bind any thing. Now, as a married woman may enter into contracts with reference to her separate property "in the same manner" as a married man may in relation to his, we shall proceed to consider in what manner a married man may enter into contracts with reference to his property. And here it will be proper for us to say that so far as this case is concerned no distinction can be made between the contract of a married man and the contract of any other person not laboring under any disability. Those who claim that the contract of a married woman has no reference to her separate property unless expressly so stated in the contract itself, must claim that there can be nothing contained in any contract unless it is contained in the express words or terms of the contract itself. There is some room for such a claim, and decisions of courts may be found to support it; but the great weight of authority in this country is unquestionably on the other side. It is almost universally held that all the laws of the country in force at the time and place where the contract is made, which can materially affect the contract, enter into and form a part of the contract. *Greer v.*

Deering v. Boyle.

v. *McCarter*, 5 Kan. 18, 22; *Mather v. Bush*, 16 Johns. 233, 249-251; *Blanchard v. Russell*, 13 Mass. 1, 16; *Moore v. Fowler*, Hampstead C. C. 536; *Bronson v. Kinzie*, 1 How. 315; *McCracken v. Howard*, 2 id. 612; *Harrison v. Stipp*, 8 Blackf. 455; *Nelson v. Rountree*, 23 Wis. 371; *Jacoway v. Denton*, 25 Ark. 625, 642. This is especially true where both parties live in the same State, and where the contract is made and to be performed in the State where the parties reside. It is said that the parties contract with reference to the laws, and make them a part of their contract. Hence such laws cannot be materially changed without impairing the obligation of said contract. U. S. Const., art. 1, § 10, subd. 1; *Bronson v. Kinzie*, 1 How. 311, 315. It is true that some courts have said that the remedy given by law for the enforcement of the contract does not enter into or form any part of the contract; but, in the light of other decisions, this is probably not strictly correct. It is probably true that the parties do not contract for the specific remedy in force when they make their contract; but it is certainly as true that they do contract for a substantial remedy. It is true that the remedy may be changed; but unless a substantial remedy still remains, the act changing the remedy is void, tending to impair the obligation of the contract. *Oatman v. Bond*, 15 Wis. 28; *Habbrouck v. Shipman*, 16 id. 296; *Call v. Hagger*, 8 Mass. 430; *Conkey v. Hart*, 14 N. Y. 30; *Jacoway v. Denton*, 25 Ark. 625, 642; *McCracken v. Hayward*, 2 How. 612; *Blair v. Williams*, 4 Litt. 37, 38, 39, 45; *Lapsley v. Brashears*, 4 id. 47; *Com. Bank of Natchez v. Chambers*, 8 Smedes & Mar. 56, *et seq.* With regard to *evidence*, see *Jackson v. How*, 19 Johns. 83; *Robinson v. Howe*, 13 Wis. 341, 347; *Smith v. Cleveland*, 17 id. 556, 568, *et seq.*; *Nelson v. Rountree*, 23 id. 368, 371. We suppose it is well known by everybody that the property of a married man is liable for all his debts and obligations, although no specific mention of his property be made in his contract. It is not necessary that a court have jurisdiction of his person in order to render judgment against his property on such a contract, subjecting the property to the payment of his debts, or the fulfillment of his obligations. He may be beyond the jurisdiction of the State; but, if his property remains, it is liable. And this liability springs as well from his contract as from the law. As to how far a man contracts with reference to his property when he makes a general contract, without specifically mentioning any of it, has been many times adju-

cated in this country. The Federal Constitution, art. 1, § 10, subd. 1, provides that no State shall pass any law impairing the obligation of contracts; and under this provision it has been necessary many times to determine what belongs and what does not belong to the contract. Mr. SEDGWICK says: "States may pass retrospective laws, however unjust; may pass acts of a judicial nature, however clearly overstepping the line of legislative power; they may pass acts divesting vested rights; they may violate express provisions of their own constitutions. Acts of these classes, however objectionable, are not within the scope of the restrictions of the Federal Constitution." Sedg. Stat. and Const. Law, 639. It is only when States pass laws affecting the contract itself that such laws come within the said Federal restriction.

In every contract it must be presumed that each party agrees that all his property, except such as may be exempt by law, or such as may be exempted by the terms of the contract itself, shall be liable for the fulfillment of the contract. Hence any general exemption law, exempting all a debtor's property, passed after a contract has been made, would be void, as tending to impair the obligation of the contract. This is the generally accepted doctrine, found, however, only in the elementary works, and in the dicta of courts, and not in any judicial decision, as no State has yet passed any law exempting all the debtor's property. It has been held that where only a portion of the debtor's property was exempted from execution, the law exempting the same was void. *Forsyth v. Marbury*, Charlton (Ga.), 324; *Quackenbush v. Danks*, 1 Den. 128; *Danks v. Quackenbush*, 3 id. 594; *Danks v. Quackenbush*, 1 N. Y. 129. But now it seems to be settled that a law may be valid that exempts a portion of the debtor's property, such as household furniture, agricultural implements, etc., provided that such portion is not great enough to materially impair the obligation of the contract sought to be enforced. *Morse v. Gould*, 11 N. Y. 281; *Rockwell v. Hubbell's Adm'r*, 2 Doug. (Mich.) 197; *Bronson v. Kinzie* (per TANEY, Ch. J., *obiter dictum*), 1 How. 311, 315; *Cusic v. Douglas*, 3 Kas. 123. But how even such laws as those last mentioned can be sustained upon any logical system of reasoning cannot easily be understood. If the question should ever be taken to the supreme court of the United States, that court would probably declare a different doctrine. A statute of New York, exempting, under certain circumstances, all the future

Deering v. Boyle.

acquisitions of property, was held void by the supreme court of the United States. This law provided that if the debtor should deliver up all his property to be applied in payment or partial payment of his debts, that after a certain time he should be discharged, and that all his future acquisitions should be exempt from such debts. It was held that this law was unconstitutional and void, that it impaired the obligation of contracts. *Sturges v. Crowninshield*, 4 Wheat. 122. "The court held that the obligation of a contract was not fulfilled by a *cessio bonorum*, for the parties had not merely in view the property in possession when the contract was made, but its application extended to further acquisitions; and to release them from being liable, impaired the obligation of the contract." 1 Kent's Com. 420. See also upon this subject, *McMillan v. McNeill*, 4 Wheat. 209; *Farmers and Mechanics' Bank v. Smith*, 6 id. 131; *Ogden v. Saunders*, 12 id. 213; *Boyle v. Zacharie*, 6 Pet. 348; *Baldwin v. Hale*, 1 Wall. 233; *Springer v. Foster*, 2 Story, 387; *Woodhull v. Wagner*, 1 Bald. 300; *Moore v. Fowler*, 1 Hemp. 536.

When a contract is made with a corporation at a time when by statute the stock of the stockholders is liable for the debts of the corporation, the legislature cannot repeal such statute and thereby exempt such stock from the payment of such debts, for such repeal would impair the obligation of the contract made between the creditor and the corporation, which contract the corporation had from the stockholders (who were virtually the sureties of the corporation to the amount of their stock) the implied authority to make. *Hawthorne v. Calef*, 2 Wall. 10, and cases there cited. In Georgia it has been decided that "a State law which impairs the obligation of a contract made prior to its passage is unconstitutional and inoperative. And it is equally so whether the contract exists in its original shape, or has been merged in a judgment." "A judgment in Georgia constitutes a *lien* from its date on all the property of the debtor, and is constructive notice to all the world; and this lien is effectual against all subsequent claims to the property derived from and through the debtor." A law which prohibits a levy on a portion of the debtor's property previously subject to an existing judgment is unconstitutional, as it impairs the obligation of a contract." *Forsyth v. Marbury*, Charlton (Ga.), 324. And where a statute makes it more difficult for the creditor to reach the debtor's property, and thereby substantially interferes with the enforcement of the contract or the collection of the debt, the statute is void. For

instance, when the law under which a contract is made authorizes property to be sold on execution to the highest bidder it will be presumed that the parties contracted that it should be so sold (if sold at all), and a law afterward passed requiring that it should be appraised and sold for not less than two-thirds of its appraised value, is a law impairing the obligation of such contract, and it is therefore void. *McCracken v. Hayward*, 2 How. 608; *Willard v. Longstreet*, 2 Doug. (Mich.) 172; *Rawler v. Hooker*, 21 Ind. 144, and cases there cited. And generally, the law in force at the time the contract is made is the law which governs in the sale of property sold on execution to satisfy a judgment rendered on such contract. *Harrison v. Stipp*, 8 Blackf. 455. Also a law passed after a contract has been made staying judgment or execution on such contract is generally held to be void, on the ground that it prevents the creditor from seizing the debtor's property to satisfy the debt, as soon as the parties are presumed to have contracted that it might be so seized. *Bumgarden v. The Circuit Court*, 4 Mo. 50; *Blair v. Williams*, 4 Litt. (Ky.) 34; *Hasbrouck v. Shipman*, 16 Wis. 296; *Bunn v. Gorgas*, 41 Penn. St. 441; *Stevens v. Andrews*, 31 Mo. 205; *Burt v. Williams*, 24 Ark. 91. So also and for the same reason, a law passed after a contract has been made giving to the debtor the right to redeem his property from a sale on execution, or extending the time for such redemption, has been held void. *Thorne v. San Francisco*, 4 Cal. 127, 139 to 142.

But we think we have already furnished sufficient illustrations to show that whenever a man contracts, he contracts with reference to all his property (not exempt), unless he otherwise express it in his contract. The decisions that we have referred to and many others which we might refer to could never have been made if such were not the law. See also *McCormick v. Holbrook*, 22 Iowa, 487. He contracts with reference to his property in this way: He makes his contract; the law provides what shall be done with his property if he does not perform the same; he knows or is presumed to know the law, and to make it a part of his contract. For instance, suppose he gives a promissory note. His contract will then be in legal effect as follows: "One year after date, for value received, I promise to pay A. B., or order, one hundred dollars, with interest. But if I do not so pay the same, then I further agree, in accordance with the present law, that said A. B., or his assignee, may sue me, obtain a judgment for that amount, have an execution

Bruce v. Luke.

issued and levied on my property, and have the same sold to satisfy said execution." This is a married man's contract with reference to his property. A married woman may, under said section 2 of the married woman's act, contract "in the same manner, to the same extent and with like effect," with reference to her property.

We do not think that the said answer of the said defendant stated a good defense to the plaintiff's action. Therefore the demurrer to the answer was properly sustained, and the decision of the court below is affirmed.

All the justices concurring.

Judgment affirmed.

BRUCE, plaintiff in error, v. LUKE.

(9 Kans. 201.)

Deed — quit-claim — after-acquired title.

A person having no title or interest in a certain tract of land, executed a deed thereof without covenants of seizin or warranty, using as words of conveyance the words, "grants, bargains, sell, aliens, releases, quitclaims and conveys." Afterward the grantor acquired title to the land and conveyed it to defendant, who purchased with knowledge of plaintiff's deed. *Held*, that the deed to plaintiff was a quitclaim deed, and that the grantor's after-acquired title did not inure to the benefit of plaintiff.

REPLEVIN by Bruce to recover possession of 4,000 railroad ties, and 150 cords of wood, cut from a certain tract of land to which both parties claimed title from one Johnnycake. The other facts are stated in the opinion. The judgment below was for the defendant, and the plaintiff brought error.

Nelson Cobb, for plaintiff in error.

M. B. Newman and *S. A Cobb*, for defendant in error.

VALENTINE, J. This was an action of replevin brought by the plaintiff in error, Charles Bruce, against the defendant in error, Jacob Luke, for the recovery of certain railroad ties and cordwood

cut on a certain piece of land of which Bruce claimed to be the owner, but of which Luke was in possession and also claimed to be the owner. Passing over all the preliminary or minor questions which might be raised in the case, we are asked to decide this question only: Who is the owner of the land? In deciding this question there are certain incidental questions which it will not be necessary for us now to consider, for they have already been considered and settled in this court in the case of *Simpson v. Greeley*, 8 Kan. 586. Some of the principles underlying some of these incidental questions were considered and settled in the case of *Douglas Co. v. U. P. Rly. Co.*, 5 id. 615. See also *Baker v. Gee*, 1 Wall. 333.

On the 11th of March, 1867, Isaac Johnnycake executed and delivered a deed of conveyance for the land now in dispute to Kate L. Simpson. The land at this time belonged to the United States (*Simpson v. Greeley, supra*). On the 17th of October, 1867, the purchase-money was paid to the United States, and on the 26th of the same month the patent was issued by the government to Alexander Caldwell. On the 9th of January, 1868, Caldwell executed and delivered a deed of conveyance for said land to Johnnycake. On the 4th of May, 1868, Kate L. Simpson and her husband executed and delivered a deed of conveyance for said land to Bruce; and on the 5th of January, 1869, Johnnycake executed and delivered a deed of conveyance for said land to Luke — Luke having full notice of all the prior deeds. At the time that Johnnycake executed the deed of conveyance to Kate L. Simpson, he had no interest in the land that could be conveyed; and the only question now is, whether the after-acquired interest which he received from Caldwell inured to the benefit of Mrs. Simpson.

At the time the deed from Johnnycake to Mrs. Simpson was executed, the following statute was in force:

“SEC. 4. Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee.” Comp. Laws, 354.

This deed does not purport to convey any particular interest or estate, nor does it anywhere assert or state that Johnnycake was possessed of any particular interest or estate which he could convey; nor is there any covenant of any kind or description whatever anywhere to be found in said deed. The deed, as we think, clearly

shows upon its face that it was intended to be only a quitclaim deed of a present and existing but unascertained, unknown, indefinite and uncertain interest. The deed in substance is as follows:

"For and in consideration of the sum of one dollar, and other valuable considerations in lawful money of the United States," Johnnycake "grants, bargains, sells, aliens, releases, quitclaims and conveys" unto Kate L. Simpson, the land in controversy, "together with all the improvements, ways, easements, rights, privileges and appurtenances to the same, belonging, or in anywise appertaining, and all remainders, reversions, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand, either at law or in equity, or otherwise howsoever of the said" Johnnycake, "in to, or out of said premises."

The two cases referred to by counsel for plaintiff from the Illinois reports are not applicable. The case of *De Wolf v. Haydn*, 24 Ill. 525, was decided under a peculiar statute of Illinois, and the law as there laid down is clearly not the law where such a statute does not exist. The case of *King v. Gilson's Adm'r*, 32 Ill. 348, was a decision in Illinois, construing an Iowa statute precisely like ours (section 4, Comp. Laws, 354), but the decision, or at least the reasoning of the court, was evidently very much affected by their own local laws, and by the hardship of that particular case. The case, however, differs widely from this. The deed in that case used words "grant, bargain and sell" only, and did not use the words "release and quitclaim;" nor did that deed use any of many other words which are used in this, which tends to show that this was intended to be only a quitclaim deed. That deed also contained the following covenants, which this deed does not contain, to wit: "That the grantors were well seized, and had good right to sell and convey; that the premises were free from incumbrance, and the grantee, his heirs or assigns, should enjoy the quiet and peaceable possession thereof." 32 Ill. 350, 351. A deed containing the words "granted, bargained, sold and quitclaimed," is only a quitclaim deed; and the grantor in the same, who had no title to the land at the time he executed the deed, is not estopped from afterward acquiring the title as against his grantee. *McCrackin v. Wright*, 14 Johns. 194; *Jackson v. Hubble*, 1 Cow. 616; and the same with reference to the words "bargain, sell, release, quitclaim and convey;" *Gibson v. Chouteau's Heirs*, 39 Mo. 536, 566. See also note to *Doe v. Oliver*, 2 Smith's Lead. Cases (6th Am. ed.), 709, and cases there cited.

Kansas Pacific Railway Company v. Nichols.

After a careful consideration of the subject we are of the opinion that a deed, such as executed by Johnnycake to Mrs. Simpson, does not estop the grantor, who, at the time of executing the same, had no title to or interest in the land mentioned in the deed from afterward acquiring title to or interest in said land as against the grantee, and that the after-acquired title or interest will not inure to the benefit of the grantee.

KINGMAN, C. J., concurring.

BREWER, J., did not sit in the case.

The judgment of the court below is affirmed.

KANSAS PACIFIC RAILWAY COMPANY V. NICHOLS.

(9 Kana. 226.)

Common carriers — responsibility of as carriers of animals.

A railroad company, receiving cattle or live stock to be transported over its road from one place to another, assumes all the responsibility of common carriers, except so far as such responsibility may be modified by special contract. (*See note, p. 500*).

ACTION by Nichols, Kennedy & Co. to recover damages for cattle lost and injured through the negligence of the defendant's railway company. The petition alleged that the defendant was a "common carrier of cattle and freight for hire;" that plaintiff had shipped a lot of cattle over defendant's road from Abilene to State Line; and "that while said cattle were in the care, custody and keeping of said defendant they so carelessly, negligently and improperly conducted themselves in regard to the same that said cattle were turned at large and escaped." The answer was a general denial.

The plaintiff had judgment on a verdict and the defendant brought error.

J. P. Usher, E. W. Dennis and Wallace Pratt, for plaintiff in error.

Thacher & Banks, for defendant in error.

Kansas Pacific Railway Company v. Nichols.

VALENTINE, J. [after deciding an unimportant point of practice]. The main question in this case is, whether the railway company, when it took the cattle of the plaintiff below for the purpose of transporting them over its road, assumed the responsibilities of a common carrier or not. We think it did. This question has already been decided in this court in the case of *The Kansas P. Railway Co. v. Reynolds*, 8 Kas. 623.* In the case of *Kimball v. The Rutland & Burlington R. R. Co.*, 26 Vt. 247, 254, *et seq.*, the court decided that "a railway company that transport cattle and live stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and with the relation the duties and obligations which grow out of it; and they are none the less common carriers from the fact that the transportation of cattle is not their principal business or employment." See also *Welsh v. Pittsburg, Ft. Wayne & C. R. R. Co.*, 10 Ohio St. 65. In the case of *The Great Western Railway Co. v. Hawkins*, 18 Mich. 427, 433, the supreme court of Michigan use the following language: "The company in this case must be regarded as common carriers, and liable as such, except so far as that liability was qualified by the special contract." The special contract just mentioned was a contract to transport nineteen horses from Paris, Canada, to Detroit, Michigan, and there is nothing in the contract or in the report of the case that tends to show that the company held themselves out as common carriers of live stock, or that they anywhere agreed or admitted that they were such carriers, and they carried these horses under a *special* contract. See also the authorities cited in the brief of defendants in error, and 2 Redf. on Railways (4th ed.), 144, note 2, and cases there cited; *Wilson v. Hamilton*, 4 Ohio St. 738; *Sager v. Portsmouth R. R. Co.*, 31 Me. 228; *Clarke v. Rochester & Syracuse R. R. Co.*, 14 N. Y. 570; *North Mo. R. R. Co. v. Akers*, 4 Kas. 453; *Keeney v. The Grand Trunk Railway Co.*, 59 Barb. 152; *Welsh v. Pitts., Ft. W. & C. R. R. Co.*, 10 Ohio St. 65. It is claimed that a different doctrine has recently been held in Michigan. *Mich. So. & North. Ind. R. R. Co. v. McDonough*, 21 Mich. 165; 4 Am. Rep. 466. This is certainly true with respect to the railroad then under consideration by the court; but whether it is true with regard to all railroads in the State of Michigan is not so certain. See pages 189, 198 and 199 of the opinion, and the comments of the court on the provisions of the charter of the Michigan

* See note, *infra*.

Kansas Pacific Railway Company v. Nichols.

Southern Railroad Co., and the act consolidating it with the Northern Indiana Railroad Company. But if this decision does apply to all the railroads of Michigan as well as to the Michigan Southern & Northern Indiana Railroad Company, under its peculiar charter, does it in any manner indicate what the law is in Kansas? We think not, or but very little at most. In Michigan, since April, 1870, railroads have not been public purposes, or public uses, in the sense that they are such in the other States of the Union. In that State they are purely and strictly private purposes or uses. *People v. Salem*, 20 Mich. 452; 4 Am. Rep. 400. The supreme court of that State say, that "they (railroad companies) are public agents in the same sense that the proprietors of many other kinds of private business are, and not in any other or different sense." "Our policy in that respect," say the court, "has changed; railroads are no longer public works, but are private property." Railroads are private, according to that decision, in the same sense that the different kinds of business of hackmen, draymen, proprietors of stage coaches, merchants, newspaper proprietors, physicians, manufacturers, mechanics, hotel-keepers, millers, etc., are private. Railroads in Michigan seem from that decision to be such private corporations as are described in the case of *Leavenworth Co. v. Miller*, 7 Kas. 524, 535. If they are such private corporations as there described, of course they have a right to be common carriers of just such property as they choose, no more and no less. This is not so in Kansas. The railroads of Kansas are organized upon a different basis. In Kansas they are endowed with a kind of quasi public as well as private character. In Kansas they are so far public that the sovereign power of eminent domain may be exercised for their benefit, and they are so far public that other public aid may be extended to them. It is believed that no railroad has yet been built in Kansas that has not been aided both by the exercise of the power of eminent domain, and by other public aid, such as lands and county or municipal bonds. Railroads are public purposes in no sense except in the sense of being common carriers of freight and passengers. It is true that there are incidental public benefits arising from the creation and operation of railroads, such as the increase in the value of property along their routes, the increase of the public revenues, etc., but these are only incidental benefits, and are not at all what make railroads public purposes. And this public character of railroads is stamped upon them at their very crea-

tion. It is stamped upon them by the sovereign power where it authorizes their coming into existence; for otherwise they could receive no public aid until the roads should be constructed and in operation, and until the roads should become public purposes by virtue of becoming common carriers of freight or passengers. And if they were created absolutely private corporations they could become common carriers only by holding themselves out as such, and by actually carrying freight or passengers. We suppose it will not be contended that any kind of public aid could be extended to a purely private corporation. If a railroad company is created as a private carrier, and not as a public or common carrier, we suppose that no one will contend that the sovereign power of eminent domain could be exercised for its benefit in its construction, or that any public aid of any kind whatever could be extended to it. That railroads are *created* common carriers of some kind, we believe, is the universal doctrine of all the courts. The main question is always, whether they are common carriers of the particular thing then under consideration? The question in this case is, whether they are common carriers of cattle? So far as our statutes are concerned no distinction is made between the carrying of cattle and that of any other kind of property. Under our statutes a railroad may as well be a common carrier of cattle as of goods, wares and merchandise, or of any other kind of property. Now, as no distinction has been made by statute between the carrying of the different kinds of property, we would infer that railroads were created for the purpose of being common carriers of all kinds of property which the wants or need of the public require to be carried, and which can be carried by railroads; and particularly we would infer that railroads were created for the purpose of being common carriers of cattle. As Kansas, and all the surrounding States and Territories, with their boundless prairies and nutritious grasses, are destined to be great stock-growing countries, it can scarcely be supposed that the legislature, in providing common carriers for the property of the public, should have omitted to provide for one of the most important kinds of property, a vast source of unbounded wealth. We have no navigable streams within the boundaries of Kansas upon which to transport cattle, and hence they must be transported by railroad, if transported by any means except by driving them on foot.

It is claimed, however, that "the transportation of cattle and

Kansas Pacific Railway Company v. Nichols.

live stock by common carriers *by land* was unknown to the common law." Suppose it was; what does that prove? The transportation of thousands of other kinds of property, either by land or water, was unknown to the common law, and yet such kinds of property are now carried by common carriers, and by railroads, every day. We get our common law from England. It was brought over by our ancestors at the earliest settlement of this country. It dates back to the fourth year of the reign of James the First, or 1607, when the first English settlement was founded in this country at Jamestown, Virginia. The body of the laws of England, as they then existed, now constitute our common law. It is so fixed by statute in this State (Comp. Laws, 678; Gen. Stat. 1127, § 3), and is generally so fixed by statute or by judicial decisions in the other States. The reason why cattle and live stock were not transported *by land* by common carriers at common law, was because no common carrier, at the time our common law was formed, had any convenient means for such transportation. Among the other kinds of property not transported by common carriers, either by land or water, at the time our common law was formed, are the following. Reapers, mowers, wheat drills, corn planters, cultivators, threshing machines, corn shellers, gypsum, guano, Indian corn, potatoes, tobacco, stoves, steam engines, sewing machines, washing machines, pianos, reed organs, fire and burglar-proof safes, etc.; and yet no one would now contend that railroads are not common carriers of these kinds of articles. At common law the character of the carrier was never determined by the kind of property that he carried. He might have been a private or special carrier of goods, wares and merchandise, or of any other kind of property, or he might have been a public or common carrier of cattle, live stock or any other kind of property, just as he chose. All personal property was subject to be carried by a common carrier, and no personal property was exempt. Whether a person was a common carrier depended wholly upon whether he held himself out to the world as such, and not upon the kind of property that he carried. A common carrier was such as undertook, "generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price." 2 Kent's Com. 598. And he could hold himself out as a common carrier by engaging in the business generally, or by

Kansas Pacific Railway Company v. Nichols.

announcing or proclaiming it to the world by the issuing of cards, circulars, advertisements, etc., or by any other means that would let the public know that he intended to be a common or general carrier for the public. Railroads hold themselves out as common carriers by an act irrevocable on their part in their very creation and organization. The very nature of their business is such that by engaging in it, or offering to engage in it, they hold themselves out as common carriers. But let us return to the point more especially under consideration. At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements, such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses. *Funnel v. Pettijohn*, 2 Harrington (Del.), 48. And it seems to us clear beyond all doubt, that if any person had in England, prior to the year 1607, held himself out as a common carrier of cattle and live stock by land, the common law would have made him such. If so, where is the valid distinction that is attempted to be made between the carrying of live stock and the carrying of any other kind of personal property? The common law never declared that certain kinds of property only could be carried by common carriers, but it permitted all kinds of personal property to be so carried. At common law any person could be a common carrier of all kinds, or any kind, and of just such kinds of personal property as he chose, no more, nor less. Of course, it is well known that at the time when our common law had its origin, that is, prior to the year 1607, railroads had no existence. But when they came into existence it must be admitted that they would be governed by the same rules, so far as applicable, which govern other carriers of property. Therefore it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying many kinds, or for carrying all kinds of property which can be carried by railroads, including cattle, live stock, etc. In this State it must be presumed that they were created for the purpose of carrying all kinds of personal property. It can hardly be supposed that they were created simply for the purpose of being

Kansas Pacific Railway Company v. Nichols.

carriers of such articles only as were carried by common carriers under the common law prior to the year 1607; for if such were the case they would be carriers of but very few of the innumerable articles that are now actually carried by railroad companies. And it can hardly be supposed that they were created for the mere purpose of taking the place of pack-horses, or clumsy wagons, often drawn by oxen, or such other primitive means of carriage and transportation as were used in England prior to that year. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by land or water, which probably includes all kinds of personal property. Our decision, then, upon this question is, that whenever a railroad company receive cattle or live stock to be transported over their road from one place to another, such company assume all the responsibilities of a common carrier, except so far as such responsibilities may be modified by special contract.

[The court then considered an instruction as to the damages, and reversed the judgment for error therein.]

NOTE. — See *Lake Shore & Michigan Southern Railway Company v. Perkins*, ante, 275; also *Ritford v. Smith*, 13 Am. Rep. (52 N. H. 355) and the note thereto, wherein the conflicting cases on this subject are collected.

The case of *Kansas Pacific Railway Company v. Reynolds*, 8 Kansas, 623, referred to in the foregoing opinion, was for an injury to cattle occasioned by delay in transporting. The cattle were shipped upon a special contract releasing the railroad company from all liability "for damages of whatever kind that may happen during the transit; this company do not assume to transport stock in any given time." The verdict was for the plaintiff, and the judgment was reversed for errors in practice, so that the question presented in the foregoing case was not necessarily before the court, but the court passed upon it as a question "likely to arise on a subsequent trial." The court said:

"Did the plaintiff in error act in the capacity of a common carrier in the transportation of these cattle, or was it entitled to the instruction refused, 'that it did not transport the cattle in question as a common carrier?' It transported them either as a common or a private carrier. Two vital distinctions in the measure of duty and responsibility incurred by carriers are these: The common carrier must carry for all who choose to employ him. The private can accept the goods of one and refuse those of another. The common carrier insures against all loss save that caused by the act of God or the public enemy. The private carrier is responsible only for ordinary care. Hence, whether the company was a common or private carrier is obviously vital. An idea seems to be obtaining in some directions that so far as regards the transportation of live stock, railroad companies are not common carriers. This is countenanced by the dicta of several judges and by some decisions. To this doctrine we cannot give our assent. It seems to us that whenever, and in so far as they assume to transport property, they do so as common carriers. The sole purpose for which railroads are built is transportation. The only legitimate business in which they can engage is transportation. They perform a public duty, are engaged in a public employment, and subserve a public use so far, that, as established by the decisions of this court, as well as those

Kansas Pacific Railway Company v. Nichols.

of the highest courts of many other States, taxation of the community in aid of their construction can be sustained. Above all other carriers are they dignified by judicial decisions as public agencies. Alone of carriers have they obtained public assistance. It is with ill grace, then, that they seek to avoid the responsibility which is assumed by all others who engage in the business of transportation. Receiving funds of the public to aid in construction, and then claiming to be simply private carriers in transporting for that public, presents an unseemly contradiction. Tried by all the definitions in the text-books and approved decisions, railroad companies are common carriers in reference to all property they assume to carry. PARKER, C. J., in *Dwight v. Brewster*, 1 Pick. 50, defined a common carrier to be 'one who undertakes for hire to transport the goods of such as choose to employ him from place to place.' EDWARDS in his work on Bailments says: 'To constitute him a common carrier he must be one who as a regular business, undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place.' STORY says 'he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation *pro hac vice*.' To the same effect are the definitions given by Angell, Kent, Bouvier and others. Can any thing be plainer than that within the scope of these definitions a railroad company is a common carrier? Transportation is its business, not a casual occupation. How frequently has it been mulcted in damages for refusing to receive and transport passengers upon equal terms? This could never be sustained if it was only a private carrier. As a common carrier it is entitled to all the privileges, and subject to all the conditions and obligations which belong to such employment. Among these is this: One may be a common carrier in reference to certain classes of goods without being under any obligation to transport a different class. He is not under obligations to transport such goods as his vehicles are not suitable to carry. A light express wagon employed as a business in carrying small parcels from one part of a city to another, is engaged in the business of a common carrier; yet no obligation rests upon the proprietor to carry in it a piano or other heavy bulky article, whose size and weight would endanger his vehicle; nor is he under obligation to provide vehicles suitable for the transportation of such goods. It is enough if he receives and carries such goods as are suitable for his vehicles. As Baron PARKER said, in *Carr v. The Lancashire & Yorkshire Railway Co.*, 7 Excheq. 711: 'Most certainly every common carrier is bound only to carry the goods of that description which the public calling requires him to carry. That is established by the case of *Johnson v. The Midland Railway Co.*, 4 Excheq. 367.' See also DENIO, J., in *Wübert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 244. 'A carrier may lawfully refuse to receive goods offered for transportation, because his coach is full, or because he has not the means of transporting such goods. *Morse v. Slue*, 1 Vent. 190-238; *Lane v. Cotton*, 1 Ld. Raymond, 646, 652; Story on Bailments, § 508.' By this rule railroad companies, like other common carriers, unless restricted by some requirement of their charter, or the statutes, not having vehicles suitable for, nor holding themselves out as engaged in the business of carrying cattle, may lawfully refuse to transport them. But this is a qualification incident to the business, common to all carriers, and not limited to any particular species of property.

"It is claimed there is a difference between live stock and other property as to the responsibility assumed by a carrier in its transportation; that the voluntary motion of the stock introduces an element of danger into the transportation against which neither reason nor authority require that the carrier insure; that, inasmuch as it is customary that the shipper or some one for him, accompany the stock, there is only a qualified or partial delivery to the carrier; and, also, that proof that a railroad company has suitable cars and is engaged in the business of carrying cattle is not proof that it is a common carrier as to such cattle, because to insure their safe transportation requires yards and stables, with conveniences for feeding, both at the terminal and along the route, as well as a corps of experienced stockmen to take care of them in the transit. These last, as it seems to us, are duties incident to the employment, and not elements to determine its character. Engaging in the business of transporting cattle, it becomes a duty to provide every suitable facility therefor. Not the

 Kansas Pacific Railway Company v. Nichols.

manner of doing the work, but the fact of engaging in the business, is the test laid down in the books for determining the character of the carrier. A proper system of brakes is necessary on every passenger train to insure the safety of those on board. Is it not enough to show that a railroad company has passenger coaches, and is engaged in the business of carrying passengers, to establish its character as a common carrier? Must it also be shown that the train is provided with a proper system of brakes, and all the other requisites of safety? Would proof that these were wanting diminish the responsibility of the carrier? Will failure of duty lessen the obligation? If we were to take judicial notice of the fact that the shipper, or some one for him, goes with the stock to take care of it during transportation, we should also be compelled to take judicial notice that the shipment is, as in this case, by special contract. The company thus limits responsibility, and the shipper assumes more of the risk. That the voluntary motion of the stock increases the risk of transportation, is evident. But increase of risk does not diminish responsibility. It calls for more care. There is more risk in carrying mirrors than railroad iron. The carrier's measure of obligations is the same. Petroleum, gunpowder, and nitro-glycerine, particularly the latter, are very dangerous to transport; yet, if one engages in the business of carrying them, does he not assume the obligations of a common carrier. That a contract by which a shipper assumes all risk from the action of the cattle themselves, is a reasonable one, cannot be questioned. It may be that, without any special contract, the law ought to be so changed that such risk be assumed by the shipper: but such change must, it seems to us, be made by the legislature and not by the courts. It is said that the carrier of slaves did not insure their safety, and that cattle should be placed upon the same footing as slaves. That carriers of slaves were not insurers, was, it is true, the nearly uniform ruling of courts. *Boyes v. Anderson*, 2 Pet. 150; *Clark v. McDonald*, 4 McCord, 223; 4 Porter (Ala.), 234. It was a ruling growing out of the anomalous character of the institution, rather than logically sustained by the rules of the common law. Slaves were held to be passengers. It would hardly do to say that cattle were passengers, and that the measure of obligation in their transportation was the same. On this general subject the language of Judge RANNEY, in the case of *Wilson v. Hamilton*, 4 Ohio St. 724, is in point: "We have been no more fortunate in finding any sufficient support for the position that the responsibilities of a common carrier in respect to other property do not attach to the carriage of living animals. No such distinction has anywhere been recognized. The contrary is expressly laid down by the elementary authors to which I have referred, as well as in several of the cases cited; to which may be added others: *Angell on Carriers*, § 214; *Story on Bailments*, § 546; *Stuart v. Crawley*, 2 Stark. 237; *Porterfield v. Humphreys*, 8 Humph. 497; *Palmer v. Grand Junction Rly.*, 4 M. & W. 749. This question has within a few years, from the great numbers of domestic cattle now carried from the west to the east, by land and water, assumed a very decided importance; but we can feel no hesitation in declaring that those who undertake their transportation take upon themselves the obligation to deliver them safely against all contingencies, except such as would excuse for the non-delivery of other property.

The conclusion then to which we have arrived is, that a railroad company engaging in the business of transporting cattle assumes all the responsibilities of a common carrier. It insures against all loss, except that caused by the act of God, or the public enemy. If it would relieve itself of this responsibility, it must take the same steps as in the transportation of any other property. It may do this by special contract, but such contract never relieves against negligence. 26 Vt. 247." — RMR.

Jones v. Blacklidge.

JONES, plaintiff in error, v. BLACKLIDGE.

(9 Kans. 502.)

Contract — agreement to collect claim against the government for a part thereof void.

Defendant, having a claim against the United States, employed the plaintiff to collect it, agreeing to pay him therefor, twenty per cent of the claim when collected. The United States paid the money to defendant. In an action by the plaintiff for his percentage, *held*, that the agreement was in contravention of the act of congress to prevent frauds upon the treasury (10 U. S. Stat. at Large, 170, § 1), and was therefore void.

ACTION by Blacklidge against Jones to recover \$1,340, alleged to be due upon a contract. The opinion states the case.

J. W. Deford and A. W. Benson, for plaintiff in error.

VALENTINE, J. On the 24th of December, 1864, John T. Jones, an adopted Ottawa Indian, had a claim pending in the Indian department against the government of the United States for the sum of \$6,700. The claim was originally larger, but it had been referred to the superintendent of Indian affairs for the central superintendency, who reported in favor of allowing that amount. The claim was for injuries done to the claimant's property in the year 1856. On the 24th of December, 1864, Jones entered into an agreement in writing, with Blacklidge, as follows:

"Articles of agreement this day made between John T. Jones, of Franklin county, Kansas, and A. N. Blacklidge, of Lawrence, Kansas, witnesseth: That the said Jones has this day employed the said Blacklidge to prosecute and collect a claim for him and against the government of the United States, for the sum of \$6,700, and for which service the said Jones agrees to pay the said Blacklidge twenty per centum on the amount of said claim when collected.

"OTTAWA, December 24, 1864.

JOHN T. JONES."

At the time this agreement was made, an act of congress, entitled "An act to prevent frauds upon the treasury of the United States," approved February 26, 1853, was in force. Section 1 of said act reads as follows:

"Be it enacted, etc., That all transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." 10 U. S. Stat. at Large, 170, § 1.

In a treaty with the Ottawas, of February 23, 1867, a provision was inserted for the payment of this claim. 15 Stat. at Large, 518, art. 18. And by an act of congress of April 10, 1869, an appropriation was made for the payment of the same. 16 Stat. at Large, 34. *Ottawas*. After this appropriation was made, Jones drew the whole amount of the claim, and then refused to pay Blacklidge any portion thereof. Blacklidge is now seeking, by this action, to recover his share thereof. Can he do it?

The validity of such contract or agreement is the first and principal question in the case. The question was raised in various ways in the court below, and now it comes squarely before this court. We do not hesitate to say that the contract was absolutely void. It was champertous in its nature, against public policy, and just such a contract as section 1 of the act of congress to prevent frauds upon the treasury of the United States wisely prohibited. It was a conditional transfer, or assignment, of a part, share, or interest in a claim against the United States, without attesting witnesses, and before a warrant for the payment thereof was issued. And it makes no difference that the consideration therefor were services to be performed in the future. The transfer or assignment of a claim is within the statute (if otherwise within), "whatever may be the consideration therefor." Any consideration that will support a contract will bring it within the statute, if it is within. Neither is it necessary that the interest transferred should be absolute, or vested, in order to come within the statute. A contingent or conditional interest is sufficient. The statute is express, that a conditional transfer or assignment is sufficient; and if the transfer or assignment be conditional, the interest in the thing transferred or assigned must also of necessity be conditional. A contingent

Jones v. Blacklidge.

interest, then, dependent upon performing the services, dependent upon collecting the claim, is a sufficient interest to bring the matter within the statute, if otherwise within. The defendant in error has filed no brief nor made any argument in this court; but from the record in the case we should judge that in the court below he at one time claimed that he obtained no interest, conditional or otherwise, in the claim itself, by virtue of said contract, which was prohibited by said act, and therefore that the contract was valid; and at another time he claimed that he had such an absolute and vested interest in the claim that his power to collect the same could not be revoked for any reason by Jones; that his authority to collect said claim was "a power coupled with an interest." Probably neither of those claims was entirely correct. Certainly we think the first was erroneous. We suppose that it will hardly be claimed, that if the contract merely contemplated the collection of the money by Blacklidge, the paying it over to Jones, and then Jones paying for Blacklidge's services out of *other money*, instead of out of the *same money*, a sum equal to twenty per cent of the claim, that the contract, as thus construed, would be valid, simply because the services were to be paid for out of *other money*, instead of out of the *same money*. Such a distinction would be altogether too finely drawn, too attenuated, too ethereal, too unsubstantial, to be entertained by courts of justice, who "look through forms and phrases to the essence of things." If the said act is to be construed as permitting such contracts, it would not tend very strongly "to prevent frauds upon the treasury of the United States." Anybody would be wise enough to know how to evade the law. Anybody would know how to purchase a claim, or an interest therein, and then pretendedly and ostensibly collect it for the person from whom he purchased, but in fact and in reality collect it (or his portion of the same) for himself. Such a construction of said act would impeach the wisdom and foresight of congress. Such a construction would show an imbecility on the part of congress scarcely conceivable—an imbecility that a town council for a country village would be ashamed of. But such is not the right construction. It was undoubtedly the intention of congress to make void all contracts like this, and all other contracts of a like nature. *Marshall v. B. & O. R. R. Co.*, 16 How. 324, 336. See also *Coquillard, Adm'r, v. Bearss*, 21 Ind. 479; *Harris v. Roof's Ex'r*, 10 Barb. 489, 493, 495; *Bryan v. Reynolds*, 5 Wis. 200; and

Jones v. Blacklidge.

Frost v. Inhabitants of Belmont, 6 Allen, 152. All contracts for the collection of claims, whether the claims are to be prosecuted before the courts, before congress, or the legislature, or before any of the executive departments, for a compensation contingent upon success, are certainly against public policy; for the compensation in such cases being contingent, and often very large in amount, holds out great inducements and temptation to the use of undue, and even corrupt means, for the collection of such claims. Whether all contracts of such a nature are void at common law, has been questioned; and for this very reason, we suppose, said act of congress was passed. This act puts at rest all question with reference to the validity of such contracts. It renders them all void. The judgment of the court below is reversed, and cause remanded for a new trial.

All the justices concurring.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

THE HOMESTEAD CASES.

(23 Gratt. 205.)

Constitutional law — homestead exemption.

The constitution and laws of a State exempted homesteads from executions for debts "heretofore or hereafter contracted." *Held*, void, in so far as they apply to contracts entered into or debts contracted before their passage, as in violation of the constitution of the United States. (*See note, p. 525.*)

THESE cases, styled by the State reporter "The Homestead Cases," present but one question: whether the provisions of article 11, section 1, of the constitution of Virginia, and the act of June 27, 1870, ch. 157, of the legislature of that State, passed in pursuance thereof, and which exempts from execution and other process, for debts "heretofore or hereafter contracted," a homestead to each householder or family head to the value of \$2,000, are in conflict with the provisions of article 8, section 10, of the United States constitution, which forbids any State to pass a law which shall impair the obligation of contracts.

In all of these cases the debts sought to be enforced against the defendants had accrued and were due before the adoption of the Virginia State constitution. The first is before the appellate court

The Homestead Cases.

upon a *supersedeas* to a judgment of the corporation court of Fredericksburg; the second, an appeal from a decree of the circuit court of Mecklenburg, and the third a *supersedeas* to a judgment of circuit court of Richmond, all of which disallowed the exemption.

J. Alfred Jones, H. A. & J. S. Wise, and Little, Mason & Grat-tan, for appellants.

Wallace, Sener, Keily, Paige and Maury, for appellees.

CHRISTIAN, J. These three cases were heard together at the late session of this court at Richmond. The arguments of counsel were submitted just before the adjournment of that session, which left us no time for their consideration. They involve the question so full of interest and importance to the whole people of this commonwealth as to the validity of that provision of the State constitution and the act of the general assembly, passed in pursuance thereof, which exempts from execution, or other legal process, a homestead to each householder or head of a family to the value of two thousand dollars.

This court, deeply impressed with the magnitude of the subject, and the high responsibility imposed upon it in the final adjudication of the question, has had the subject, since its adjournment at Richmond, under careful and anxious consideration.

It is much to be regretted that a subject of such general interest and importance should not, at an earlier day, have received the final adjudication of the supreme tribunal constituted by law, to pronounce the supreme law of the State, instead of being left to the decision of inferior courts, some of which have sustained the validity of the "homestead exemption," while others have pronounced against it, thus leaving the law unsettled, and the people, both debtor and creditor, in doubts as to their rights and liabilities.

Not long after the constitution of the present court the announcement was made from the bench, by the president, that the court would take up out of its turn for hearing any case involving this question. No such case, however, was ready to be heard (until near the close of the last session at Richmond), and we now proceed, at the earliest moment consistent with a due consideration of the important questions involved, to pronounce our unanimous judgment upon the cases submitted to us.

The Homestead Cases

No question of greater delicacy can ever be presented to a judicial tribunal, and especially to one of the last resort, and from which there is no appeal, than a question involving the validity of an act of the legislature, particularly where the act is in furtherance of a provision of the organic law of the State, incorporated in the solemn form of a constitution. Such a law, in pursuance of such a provision, organic in terms, and purporting to speak in solemn form, the sovereign will of the people, must be always sustained and upheld, unless it is plain that it abrogates and annuls that "supreme law of the land," the constitution of the United States.

And while it is the duty of the judicial department generally to give effect to the acts of its co-equal and co-ordinate department, the legislative, and always in a doubtful case to solve the doubt in favor of the validity of the law; on the other hand, it is one of its highest duties and most solemn prerogatives *to declare what the law is*. And where the legislative will, or the popular will declared in the solemn form of a constitution, is in contravention of the *supreme law* of the land, the judicial department must uphold *that law*, and unflinchingly guard it as inviolable. This principle and this duty grow out of no superiority, which the judicial department of the government claims over the legislative, but is inherent in the very nature and form of our system of government. In exercising this high authority, the courts claim no supremacy over the legislature. They are only the administrators of the paramount law expressing the public will. If an act of the legislature is held void, it is not because the courts have any control over legislative power, but because the act is forbidden by the constitution, and because the will of the people therein declared is paramount to that of their representatives expressed in any law. The power, however, is a delicate one, and is always exercised with reluctance and hesitation. But it is a duty which the courts in a proper case are not at liberty to decline, but must firmly and conscientiously perform.

The provisions of the constitution, and the act of the legislature made in pursuance thereof, the validity of which is called in question in the cases before us, is in these words:

Article XI, section 1. "Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing, or sale under any execution, order or other process issuing on any demand for any debt heretofore or hereafter contracted, his real

or personal property, or either, including money or debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding \$2,000, to be selected by him," etc.

The single question which we have to determine is, whether this provision of the State constitution, and of the act of 1870, which is but a copy of this article, is in violation of the provision of the constitution of the United States, which declares that "no State shall pass any law impairing the obligation of a contract."

We may observe, before proceeding to discuss the main question, that this prohibition of the Federal constitution is upon *the State*, without regard to the form its laws may take, or the agencies which enact them. It is certain that the obligation of a contract can no more be impaired by the constitution of a State than by an act of its legislature. It has been well settled by the adjudications of the supreme court of the United States, that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibitions they are substantially the same thing. *Dodge v. Woolsey*, 18 How. (U. S.) 334; *White v. Hart et al.*, 13 Wall. 646.

The validity of the law in question is attempted to be maintained upon three grounds:

1st. That when the constitution containing the homestead provision was adopted, Virginia was not a State of the Union; that she had sundered her connection as such, and was a conquered territory wholly at the mercy of the conqueror; and that hence the inhibition of the States, by the constitution of the United States, to pass any law impairing the obligation of contracts, had no application to Virginia; that the constitution, having no validity until approved by congress, was the act of congress, and not of the State; and though a State cannot pass any law impairing the obligation of contracts, congress may; and that for this reason also the inhibition in the constitution of the United States has no operation.

2d. That the law in question affects only *the remedy*, and does not impair the obligation of contracts; that all exemption laws must be considered as affecting the remedy only, and that the legislature has the right to modify the remedy as it may deem proper.

3d. That the power of the legislature to exempt certain articles of necessity has never been questioned, and that *the amount* of exemption is a matter of discretion with the legislative department

The Homestead Cases.

of the government, with which the judicial department cannot interfere.

It is upon these three propositions that the argument in favor of the validity of the "homestead exemption" is based; and, if either one is sound, the law must be sustained as valid and constitutional.

As to the first proposition, to wit, that the inhibition of the constitution of the United States applies to States in the Union, and that Virginia was not, at the time of the adoption of her present constitution, a State in the Union, it is sufficient of remark that very recently that question has been definitely adjusted by the supreme court of the United States, and the *status* of the seceding States, with reference to the Federal Union, is no longer an open question.

The case of *White v. Hart*, decided at the last term of that court, was a writ of error to the supreme court of the State of Georgia. The constitution of that State contained a provision "that no court or officer shall have, nor shall the general assembly give, jurisdiction, to try or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof;" and the question was, whether this provision of the constitution of Georgia was in conflict with that of the constitution of the United States, which declares that no State shall pass any law impairing the obligation of a contract. The supreme court of Georgia decided in favor of the validity of the constitutional provision of that State. That judgment was reversed by the supreme court of the United States. It was sought to be maintained mainly upon the ground that, when the constitution of 1868 was adopted, Georgia was not a State in the Union, and that the inhibition of the constitution of the United States had no application to her.

This question, which had been incidentally discussed in other cases before that court, was thus directly brought up and pronounced upon by that tribunal. Mr. Justice SWAINE, delivering the opinion of the court, says: "At no time were the rebellious States out of the pale of the Union. Their rights under the constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remain the same." * * * "Georgia, after her rebellion, and before her representation was restored, had no more power to grant a title of nobility, to pass a bill of attainder, an *ex post facto* law, or law impairing the obligation of contracts, or to do any thing else prohibited to her by

the constitution of the United States, then she had before her rebellion began, or after her restoration to her normal position in the Union."

This decision upon a constitutional question, made by the highest tribunal in the land, specially constituted and clothed with the authority to adjudicate questions of this character, is binding upon this court; and while we do not adopt its language or its reasoning in all respects, its conclusions must be adopted as settling the *status* of the seceding States. But if the question was not *res adjudicata* — if it were still an open question whether the seceding States, by the act of secession, actually sundered their connection with the Federal Union — the result, in my view, would be precisely the same. If they are to be regarded as "out of the Union" from the date of the adoption of their respective ordinances of secession until their representation in congress was restored, yet the moment they were re-admitted and restored to their normal position in the Union, the constitution of the United States at once operated upon them as the "supreme law of the land," and they became at once bound by the force of its prohibitions, as well as entitled to the benefits of its protection. And if there was any thing in their constitution and laws in conflict with the constitution of the United States, thenceforward the latter would prevail as controlling and supreme.

But it is further insisted by the counsel for the appellants, that the present constitution of Virginia, having no validity under the reconstruction laws, until approved by congress, must be regarded as a law of congress; and that, therefore, the inhibition of the constitution of the United States which is upon the *States*, and not upon congress, has no application.

In answer to this view (which I would not deem it necessary to notice, except out of respect to the counsel who so earnestly pressed it in argument), it is sufficient to remark, first, that in no sense can the constitution of this State be regarded as a law of congress. It is true that, under the act of March, 1867, the approval of the constitution by congress was required before the State should be entitled to representation. The effect of withholding its approval would have been to continue the military government to which the State was then subjected. But when the constitution was approved, and senators and representatives elected under it admitted, it then became the organic law of this State, binding upon all the citizens.

The Homestead Cases.

of the State and all departments of the State government organized under it, except so far as any of its provisions may be in conflict with the constitution of the United States. If it is to be considered a mere creature and law of congress, then congress may repeal it and declare it void. It can no more do this than it can declare the constitution of New York a nullity. It is as much the constitution of Virginia, and beyond the power or control of congress, as the constitution of any of the northern States of the Union. The approval of the constitution by congress was a condition precedent to the withdrawal of the military authority of the United States, and re-establishment of the civil authority of the State. That having been accomplished, the power and authority of congress (if it ever legitimately had any) is at an end.

But suppose the constitution of Virginia could, in any view, be considered an act of congress, then I deny that congress can violate the constitution of the United States any more than a State. That constitution is the "supreme law of the land," paramount in its obligation and binding force upon all departments of government, State and federal; upon the national legislature as well as the State legislatures; upon the judicial and executive, as well as upon the legislative departments of both federal and State governments; upon the whole people, governing and restraining their acts and conduct, whether exercised by their representatives in the national congress, or by their representatives in State conventions and State legislatures. It is to each and all the supreme law of the land.

It would be a monstrous fallacy to hold, either that congress can authorize a State to do that which the constitution of the United States prohibits a State from doing, or that congress may itself supersede the national constitution.

The prohibition of the constitution *upon the States* was necessary because the States could do any thing not prohibited by the constitution. The prohibition upon congress was not necessary, because congress could do nothing except under powers granted by the constitution. But I will not pursue the discussion further, because the point that congress no more than a State can supersede the national constitution has been very recently expressly decided by the supreme court of the United States. See *White v. Hart*, to be reported in 13 Wallace, decided at the last term.

I am, therefore, of the opinion that the validity of the "home-

VOL. XII. — 65

The Homestead Cases.

stead exemption" cannot be maintained upon the first ground insisted upon by the appellant's counsel.

I am now to consider the second proposition upon which it is sought to be maintained, to wit, that "the law in question affects the *remedy only*, and does not, therefore, *impair the obligation of contracts*," and consequently is not within the inhibition of the constitution of the United States. It here becomes necessary to ascertain with precision the meaning of the constitutional prohibition and the object of its insertion. Its object plainly was to secure against legislative invasion the sanctity of contracts, and to preserve their uniform inviolability in all the States. Of such importance is this principle regarded, that the large majority of the States have incorporated it either in their bill of rights or constitution in the same language used in the constitution of the United States.

It was said by this court in *Taylor v. Stearns*, 18 Gratt. 244, after an instructive review of the circumstances under which this restriction was adopted, "the contemporaneous history of the legislation out of which this restriction grew, and the declarations of the framers of the constitution, conclusively prove that this clause was designed to interdict to the States all legislative interference with contracts, such as had so disastrously relaxed the morals, interrupted the commerce, and disturbed the harmony of the States. For obvious reasons, no attempt was made to enumerate cases within this prohibition; but its terms were so comprehensive as clearly to embrace the antecedent mischiefs to which it was directed, as well as to provide against future evils of the same kind." The terms used in the constitution, "no State shall pass any law impairing the obligation of a contract," are terms, in the language of MARSHALL, C. J., for which "it would seem difficult to substitute words which are more intelligible or less liable to misconstruction." *Sturges v. Crowninshield*, 4 Wheat. 122.

But plain and comprehensive as are the terms used in the constitution, they have been the subject of settled judicial interpretation by the supreme court of the United States, as well as the supreme courts of many of the States of the Union, and we are not left to etymological discussion to arrive at their true meaning and legal import. These are indubitably and irreversibly fixed by a weight of authority which cannot now be shaken.

The decisions of the supreme court of the United States in a long series of years, from *Fletcher v. Peck*, 6 Cranch, decided in 1810,

The Homestead Cases.

down to *White v. Hart*, 13 Wall. 646, decided in December, 1871, have given a uniform and unvarying construction to this clause of the federal constitution.

From these decisions may be extracted the following propositions as to the true interpretation and legal import of the constitutional provision referred to:

(1.) The obligation of a contract is the law which binds the parties to perform their agreement.

(2.) Nothing can be more material to the obligation than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which are guaranteed by the constitution against invasion.

(3.) The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated into its terms.

(4.) It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided that no substantial right secured by the contract is thereby impaired. But any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution.

Fletcher v. Peck, 6 Cranch, 87; *Green v. Biddle*, 8 Wheat. 1; *McCracken v. Hayward*, 2 How. (U. S.) 608; *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 id. 213; *Von Hoffman v. City of Quincy*, 4 Wall. (U. S.) 553; *Hawthorne v. Calef*, 2 id. 10; *White v. Hart*, 13 Wall. 646.

These decisions have been uniformly followed by this court, and recently reaffirmed in the cases of *Taylor v. Stearns*, 18 Gratt. 244, and the *Bank of the Old Dominion v. McVeigh*, 20 id. 457.

Applying these principles which must be regarded as now well settled (notwithstanding some contrary decisions of State courts, which I shall notice presently) let us inquire what were the mutual rights and obligations of debtor and creditor as to contracts made before the "homestead law."

The obligation of the debtor was to pay his debt. The right of the creditor was to enforce its payment. Under the laws existing at the time, which entered into and were a part of the contract, the creditor had a right to subject, by execution or other legal process,

The Homestead Cases.

the whole property of the debtor (except certain articles of personal property already exempted by existing laws). Nay, more, the debtor was prohibited from withdrawing his property from that liability, and appropriating it, either openly or upon secret trust, to his own use, or the use of his family. Every attempt to do that was, by law, declared fraudulent and void. But this "homestead law," to the extent of \$2,000, takes away the right which the creditor had at the time that the contract was entered into to enforce the payment of his debt, and allows the debtor to make a conveyance of the property, to that extent, for the use of himself and family, which, before the law was passed, would have been pronounced by the courts fraudulent and void. How can it be said that such a law does not impair the obligation of the contract? "One of the tests that the contract has been impaired" (says Mr. Justice WOODBURY, in *Planters' Bank v. Sharp*, 6 How. [U. S.] 327), "is, that its value has, by legislation, been diminished. It is not, by the constitution, to be impaired at all." In nine cases out of ten, under this law, the obligation of the contract has not only been impaired, but utterly destroyed; its value has not only been diminished, but its enforcement is made impossible. In the large majority of cases the remedy is not only obstructed, but wholly denied. I am aware that some of the decisions of the State courts have gone to the extent of maintaining the validity of exemption laws, even as to antecedent debts, but I have seen no opinion which can be regarded as prevailing authority against the unbroken current of decisions of the supreme court of the United States, from 1810 down to 1871, and which have been uniformly acted upon and followed in this country.

The difference of judicial opinion and interpretation (if there can be said to be any difference worthy of an attempt to reconcile the great weight of authority, even in the State courts, being one way), grows out of a confused and untenable distinction between laws which operate on the rights, under a contract, and those which operate on the remedies by which they are to be enforced. Those distinctions have grown up from the *dicta* of judges wrested from the connection in which they were used, and upon which ingenious theories have been built up, to sustain popular legislation.

Every opinion which I have seen sustaining the validity of the "homestead exemption," as applicable to antecedent contracts (except those cases, like the Georgia case, lately overruled by the

The Homestead Cases.

supreme court of the United States, which puts the decision upon the ground that Georgia was not a State in the Union, and therefore not governed by the constitutional prohibition), is based upon a *dictum* of Chief Justice TANEY, in *Bronson v. Kinzie*. And yet *Bronson v. Kinzie* is one of the very strongest cases in favor of the now acknowledged *doctrine* of the supreme court, that the laws in force at the time of the contract, and the place of its performance, enter into and form a part of it, as if they were expressly referred to and incorporated into its very terms; and that any subsequent law which, in its operation, amounts to an obstruction or denial of the rights accruing by a contract, though professing to act only on the remedy, is clearly obnoxious to the prohibition of the constitution.

I say most, if not all, the cases which attempt to sustain these homestead laws in other States, are based upon an *obiter dictum* of Chief Justice TANEY, in *Bronson v. Kinzie* (for the question of the absolute exemption of property did not arise in the case), and that *dictum* even does not justify the decisions, for it is wrested from its connection, and the sense is obscured by giving only a garbled extract from his opinion.

The chief justice is speaking of the right of a State to modify remedies and regulate modes of proceedings in its courts. He uses the following language:

“For, undoubtedly, a State may regulate at pleasure, modes of proceedings in its courts, in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims should be barred by the statute of limitations. It may, if it think proper, direct that necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, like wearing apparel, shall not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty according to its own rules of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be devised, less convenient than the old one, and may in some degree render the recovery of debts more

The Homestead Cases.

tardy and difficult, yet it will not follow that the law is unconstitutional."

Those who ground themselves upon this language of the chief justice, stop here; and if he had stopped here, without qualification of these remarks, there might have been some foundation for the position taken in the cases referred to. But the chief justice adds this significant language: "*Whatever belongs merely to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution.*"

After quoting and approving the decision of the Supreme Court in *Green v. Biddle*, a strong case in support of the doctrine, that the impairment of a contract, whether the law operates on the remedy or directly on the contract, is forbidden by the constitution; he proceeds to say, "No one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and avoid, and one which took away all remedy to enforce them, or incumbered it with conditions that rendered it useless or impracticable to pursue it."

After quoting a paragraph from Mr. Blackstone's Commentaries on the laws of England, he proceeds: "We have quoted the entire paragraph because it shows and illustrates by a familiar example the connection of the remedy with the right. It is the part of the municipal law which protects the right and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution now in question is mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose it was designed to protect a mere barren and abstract right without any practical operation upon the business of life. It was, undoubtedly, adopted as a part of the constitution for a great and useful purpose. It was to maintain the integrity of contracts and to secure their faithful execution throughout this Union, by placing them under the protection of the constitution of the United States. And it would ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy which would render this provision illusive

The Homestead Cases.

and nugatory ; mere words of form affording no protection and producing no practical results."

Such is the language of Chief Justice TANEY, in *Bronson v. Kinzie*, the case mainly relied on by those who maintain the position that the legislature may, in its discretion, exempt property of the debtor to the amount of thousands, and that such exemption is lawful and valid even against antecedent debts. It seems to me to be a strange misconception of the meaning, and a perversion of the sound doctrines of this opinion, to rely upon it as authority to sustain homestead exemptions to the value of thousands of dollars.

But even this *dictum* of Chief Justice TANEY has been virtually overturned by the decision in *McCracken v. Hayward*, 2 How. (U. S.) 608; and *Planters' Bank v. Sharp*, 6 id. 327. The first named was a case where the law was applicable to *the remedy only*. The case arose upon a statute touching sales upon executions. The law provided that where executions should be levied upon any property, real or personal, it should be the duty of the officer to summon three householders, who, after being sworn, should fairly and impartially value the property; and when offered for sale, it should not be sold unless two-thirds of the amount of such valuation should be bid therefor. This law was held by the supreme court of the United States to be unconstitutional and void. If a law which only prohibits a creditor from taking the property at less than two-thirds of its sworn value, cannot be supported, it needs no argument to prove that a law cannot be upheld which *wholly withdraws the property* from the reach of the creditor.

This *dictum* has also been overruled by the last-named case, in which Mr. Justice WOODBURY says: "One of the true tests that a contract has been impaired, is, that its value has been diminished. It is not by the constitution to *be impaired at all*."

And yet this mere *dictum* (already overruled) of the Chief Justice, which favors the opinion that "necessary implements, or the tools of a mechanic, or articles of necessity in household furniture, like wearing apparel, may be exempted from sale on execution," is seized upon as the foundation of a false judicial interpretation, which, in some of the southern States, has upheld as valid, exemption laws, which, in the great majority of cases, exempts the whole property of the debtor.

They rest upon the fallacy of assuming that the legislature has the power to make exemptions of what is "*necessary*" to the debtor

or his family. The implements of agriculture are no more a necessity to the farmer than a farm upon which to use them; and "household furniture" is no more essential to the head of a family than a house to live in. The mechanic must have a workshop as well as the tools of his trade, and to all classes money or property with which to purchase food and raiment is as needful as any thing else. It is upon reasoning like this, based upon a false premise and a *solitary dictum*, which has been wrested from its connection with language which qualifies its meaning, that some of the courts referred to, in their efforts to uphold a popular law, have held to be valid and constitutional, laws which exempt and withdraw from the reach of the creditor property to the value of thousands of dollars, and hundreds of acres of land, whether worth one dollar or one thousand dollars per acre; indeed, exempting the whole property which the debtor had in his possession at the time the contract was made, and upon the faith of which the debt was contracted. Such is the absurd result to which this doctrine has been carried.

And indeed this is the logical result of conceding the power of the legislature to exempt from execution, by a subsequent law, property which was liable to execution at the time the debt was contracted. There is, I conceive, no well-defined middle ground between holding that none of the debtor's property can, by a subsequent law, be withdrawn from the reach of the creditor, or else admitting that the whole of his estate may be exempted from sale or execution. In my view, the true doctrine, sustained by the great weight of authority, is that such property as was subject to execution at the time the debt was contracted must continue subject to execution until the debt is paid, so long as it remains in the hands of the debtor. The legislature of this State, up to the adoption of the present constitution, have always recognized this as the correct principle; and whenever, in the interest of humanity or sound policy, they have added to the list of exemptions other property of the debtor not exempted before, *they have been careful to make such laws prospective* — never retrospective — in their operation; applying the additional exemptions to future — never to past — obligations. As to future obligations, the legislature may make the exemption as broad as it pleases. It may abolish credit altogether. But it cannot, by retrospective legislation, annul the force of prior obligations. If it could do this, then the integrity of contracts, and the security for their faithful execution, in every State

The Homestead Cases.

in the Union, would no longer be placed under the protection of the constitution of the United States, but would rest entirely upon the discretion of the legislatures or conventions of the several States. And where would be found the limit upon that discretion? The power to exempt \$2,000 carries with it the power to exempt \$10,000 or \$20,000, or the whole property of the debtor.

One of the counsel who argued in favor of sustaining the homestead exemption, insisted that the *amount* of exemption was wholly a matter of legislative discretion, and that the judicial department of the government could not interfere with this legislative discretion. This is a concession that it is without limit or control, and that it is in the power of the legislature virtually to wipe out every debt and destroy every contract of the citizens of this commonwealth, by withdrawing property of the debtor from the reach of the creditor; and that this may be done in the teeth of that provision of the federal constitution, which declares that "no State shall pass any law impairing the obligation of a contract." Was it to protect a mere barren and abstract right that this provision was adopted? Was it a declaration of a moral principle, without any binding force upon the States, or without any practical operation upon the business of life? Or was it adopted as a part of the constitution for the great and useful purpose of maintaining the integrity of contracts, and securing their faithful execution, throughout the Union, by placing them under the protection of the constitution of the United States, and by pledging the public faith in the most solemn form, that the obligation of contracts, public and private, should remain forever inviolable? There can be but one answer to these questions, and it would not only be "unjust to the memory of the great men who framed the constitution," but in violation of the judicial opinions of the great men who have expounded the constitution, to sanction a doctrine which would render one of its plain provisions illusive and nugatory — mere words of form, affording no protection, and producing no practical results.

The exemption law under consideration withdraws from the reach of his creditors property to the amount of \$2,000 in the possession of each debtor who is a householder or head of a family, and permits him to appropriate it to his family. It may be the very property upon which credit was given, and upon the faith of which the debt was contracted, that is thus appropriated. It may be that the "homestead" which the debtor is permitted to "lay off

The Homestead Cases.

and assign" to himself was purchased with money which was borrowed from his creditor. It may be the debt contracted enabled him to maintain and educate his children. However sacred the obligation, however binding upon the highest principles of morality and honor, he is permitted by this law to appropriate to himself property which rightfully and lawfully belongs to his creditor. At the time the contract was entered into, every dollar of this property was bound for the debt. The right of the creditor was to subject it by legal process to the payment of his debt. To appropriate it to the use of the debtor or his family was made by law a fraud upon the rights of the creditor. This right, and the laws in existence at the time for its enforcement, were as much a part of the contract, a part of the obligation, as if they were written out as a part and parcel of the stipulation between the debtor and creditor. And yet it is pretended that because the States have, from motives of humanity, exempted from execution certain articles of necessity, they may, on this idea of legislative discretion, swell the amount to thousands, and, indeed, exempt, in the majority of cases, the whole property of the debtor, and thus cancel by legislative enactment every debt that he owes.

I think it is safe to assume that nine-tenths of the debtors of the State are not owners of more than \$2,000 worth of property. So that the effect of the "homestead exemption" would be practically to relieve nine-tenths of the citizens of the State from the payment of all their debts, while the remaining tenth must pay to the last dollar every debt they ever contracted. Such partial and class legislation ought not to be tolerated, unless it can be clearly sustained by the law and the constitution.

One of the counsel for the appellants, while he insisted that the question as to *what amount* of the debtor's property ought to be exempted, was a matter of legislative discretion, yet admitted that the legislature ought to exercise a reasonable discretion, and argued that, under the peculiar circumstances of the country, the sum of \$2,000 was as reasonable as the exemptions made under former laws. I have already shown that all exemption laws passed in this State, except the one now under consideration, were always prospective; and I have attempted to show, that every law which withdraws any part of the debtor's property from the reach of the creditor, which was liable to execution at the time the contract was made, is unconstitutional and void. It may be instructive, as

The Homestead Cases.

illustrating the extreme result to which this view of the counsel would lead, to refer to a few facts and statistics which bear upon the question as to whether the exemption by the statute under consideration is a reasonable one. The whole population of this State, according to the census of 1870, is 1,225,000. It is safe to assume that one-sixth of the whole population are householders or heads of families, which gives, in round numbers, say, 200,000 as the number. Multiply 200,000 by 2,000, and we have \$400,000,000 of property in this State exempted from execution. According to the last auditor's report, the whole value of all real estate in Virginia is \$276,116,000, and of personal estate \$86,321,708, making the aggregate value of the real and personal estate \$365,487,708. The "homestead exemption," allowing each householder or head of a family to set apart for his own use, and the use of his family, \$2,000 of his property, thereby exempts from execution, and withdraws from the reach of creditors, property in this State to the amount of \$400,000,000, which is over \$120,000,000 more than the value of the whole real estate in the limits of the commonwealth, and is over \$300,000,000 more than the value of the whole personal estate owned by all the people of the State. And yet, in the face of such an exhibit as this, it is argued that the legislative discretion (which, it is insisted, controls this subject) has been reasonably and fairly exercised. It seems to me these figures show that such exemption, so far from being reasonable, amounts to *absolute repudiation*. It is no answer to this startling exhibit to say that each "householder or head of a family" is not possessed of \$2,000 worth of property. This is true; but, under the law, his future acquisitions to that amount may be appropriated to himself, and withdrawn from the reach of his creditor, so that the practical effect is to release this enormous amount of property from the enforcement of contracts and the payment of debts.

There is one other view of counsel, which I propose briefly to notice. Much has been said in argument about the *debtor* class and the *creditor* class, and attempts are made to array one against the other, and counsel have indulged in impassioned appeals in favor of the one and denunciations against the other. This tribunal cannot listen for a moment to such arguments and such appeals. No class and no distinction among the citizens of the commonwealth can be recognized here. Whatever the consequences may be, our province is to *declare what the law is*. This we must do firmly and

fearlessly, without regard to the interests of one or another class, without regard to the disasters or benefit which may result to the one or the other from our decision.

But the truth is, there is no such thing as a "debtor class and creditor class" among the people of the State, in the sense in which this expression has been used. In the great majority of cases, every man is both a creditor and a debtor, and, in many cases, if the debtor could receive what is due to him, he would be no longer a debtor, for he would have the means of paying his debts without selling his property. And I am persuaded that no such disastrous consequences as those depicted by counsel will flow from a judicial sentence against the validity of the homestead exemption. The great bulk of the indebtedness of the people is due to the people of the State, and not to citizens of other States. The latter class of debts have long ago been adjusted and compromised. And while such indebtedness to each other is, undoubtedly, heavy and burdensome, it will require a much smaller sum to discharge the whole than is generally supposed. Where A pays his debt to B, it enables B to pay his debt to C, and so to the end of the alphabet. So that an insignificant sum may discharge an enormous amount of the aggregate debt of the whole people.

I feel, too, an abiding confidence in the hope and the belief that debtor and creditor will meet together in a spirit of compromise and fair dealing; and under the influence of those kindly and humane sympathies which should characterize men who have risked so much and lost so much in a common cause, and who have been whelmed in a common ruin, much of the calamity and suffering so eloquently depicted by counsel may be averted.

But whatever may be the consequences; however great the sufferings of individuals; however wide-spread the ruin growing out of a sacrifice of property, and causing universal bankruptcy; however all this might affect our sensibilities as men; yet, as the expounders of the laws and constitution for this high tribunal of the last resort, we must uphold, with stern inflexibility and unflinching fidelity, the requirements of those laws and the mandate of that constitution, as the only safeguards of private rights and the only protection of a well-ordered society.

And better, far better, for the people of this commonwealth, for social progress and enduring prosperity, would be temporary, though universal, bankruptcy, than the bankruptcy of public

The Homestead Cases.

morals and the destruction of public and private faith, which laws, like the one under consideration, upheld by a subservient judiciary, would surely engender. Better, far better, that poverty and adversity should be patiently endured for a time than by temporary expedients, which violate the high morality of the law and the wise restraints of the constitution, to engender a disregard of private rights, the repudiation of public and private obligations, the want of confidence between man and man, and to cultivate and encourage among the people a want of respect for those laws and that constitution, whose wise restraints and fundamental guarantees can only secure their prosperity and happiness, and which constitute the bulwarks of their protection. No State and no people can have real and enduring prosperity, except where public faith and private faith are guarded by laws wisely administered and faithfully executed.

The inviolability of contracts, public and private, is the foundation of all social progress, and the corner-stone of all the forms of civilized society, wherever an enlightened jurisprudence prevails. In our system of government it has been wisely placed under the constitution of the United States, and there it rests secure against all invasion.

It only remains for me to say that, after careful consideration of the important question before us, and deeply impressed with the responsibilities which grow out of it, I am of opinion that the provision of the State constitution and the act of the General Assembly, passed in pursuance thereof, known as the homestead exemption laws, so far as they apply to contracts entered into or debts contracted before their adoption, are in violation of the constitution of the United States, and, therefore, void. The judgment in each case must be affirmed.

The other judges concurred in the opinion of CHRISTIAN, J.

Judgments and decree affirmed.

NOTE.—See *Garrett v. Chesire*, *post*, holding that the homestead law of North Carolina does not impair the obligation of contracts. See also note thereto. — RMP.

HENDERLITE, appellants, v. THURMAN.

(23 Gratt. 466.)

Constitutional law — bonds given as security for slaves.

Plaintiff, on a judicial sale had in October, 1863, became security for the purchase-price of a lot of slaves sold thereat. *Held*, that his bond was valid and its payment obligatory notwithstanding the emancipation proclamation made before and that it could be enforced after the adoption of the thirteenth amendment to the United States constitution.

APPLICATION to set aside an order directing the prosecution of bonds given by Henderlite, as security for the purchase-price of slaves.

Thomas Thurman died leaving a will which was afterward (April 6, 1863) admitted to probate in the circuit court of Smyth county. His estate was given in the will to his three sons then living and the two children of another son who were to take one share. April 27, 1863, the three sons, two of whom were executors, filed a bill alleging that partition of the estate could not be made, and asking a sale thereof. A guardian *ad litem* was appointed of the grandchildren of deceased who were infants, and on September 8, 1863, a decree was entered appointing James H. Gilmore, commissioner to sell the property and ascertain the respective shares due each legatee. The commissioner reported that a sale of the property had been had in October, 1863, and realized \$5,950 for the real estate, and \$13,110 for the slaves. The share of each party, less the sale's expenses, would be \$4,409.95 subject to costs. The purchasers gave their bonds, with George H. Henderlite as security. April 5, 1864, the commissioner's report was confirmed and he directed to convey the real estate to the purchasers and hold; as receiver, the bonds for the infants' shares until the further order of the court. August 20, 1867, the court directed the commissioner to obtain judgments on the bonds he held, which was done in 1868.

At the August term, 1868, an application was made to the court by Henderlite and Thomas Thurman, both in his own right and as administrator of his brother Edward, to set aside the decrees and orders theretofore made in the cause, upon the ground that by President Lincoln's proclamation of emancipation and acts of congress

Henderlite v. Thurman.

the slaves, which were the consideration principally of the bonds, had been freed, and therefore the bonds were void; that they were also void because the constitution of 1864 abolished slavery, and that they were further void by virtue of the act of congress of July 17, 1862, to punish treason and rebellion; that the sales were for Confederate money, and the price of the real estate should be scaled or the property resold.

The application was continued until August 28, 1869, when the court refused it and Henderlite appealed.

Mr. Baxter, for appellant.

Mr. Gilmore, for appellees.

STAPLES, J. This case has been twice ably and elaborately argued before this court. As the first argument was before three judges only, a re-argument before a full court was requested. That argument was heard at the last term held in Wytheville, all the judges being present. It becomes my duty now to announce their unanimous decision, and the reasons upon which that decision is based.

The controlling question in the case is as to the effect of the proclamation issued by President Lincoln on the 1st day of January, 1863, and known as the emancipation proclamation. On the one hand, it is maintained, that this proclamation from the time of its emanation, in connection with the various acts of congress authorizing and confirming it, conferred a right to freedom upon all slaves within the States therein designated. On the other, it is insisted, that it was limited in its practical effect, to such slaves individually as came under its operation while it was in active exercise as a war measure. In order to discuss properly these questions, it becomes necessary to recur briefly to a few familiar principles. It has never been maintained by any respectable authority, that the federal government was authorized, under the constitution, in any manner to interfere with the institution of slavery in the several States. The right of property of the master in a slave was recognized not only in the constitution, but by every department of the government, from its foundation down to the commencement of the war between the States. If any proposition could be regarded as settled beyond all cavil and controversy, it was that this institution was

entitled to the benefit of all the provisions and guarantees provided for the protection of any other property. See *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. (U. S.) 539. But a brief period before the commencement of hostilities the congress of the United States, by a resolution unanimously adopted, declared that neither the federal government, nor the people, nor the governments of the non-slaveholding States, have the right to legislate upon, or interfere with, slavery in any of the slaveholding States of the Union.

It cannot be necessary by argument to maintain that a power denied to all the departments of the federal government combined, cannot be exercised by the executive alone. His powers are plainly defined in the constitution and the acts of congress, and to these we must look to ascertain the measure of his authority. In neither can any warrant be found for the extraordinary powers assumed in the proclamation. If any act or resolution was ever passed by the federal congress, authorizing that proclamation or sanctioning it after it was issued, I have been unable to find it. The learned counsel for the appellant insisted there was some such legislation, but he did not produce it nor tell us where it was to be found. I think it very clear that no such laws were ever enacted by congress.

It was argued, however, that the president was empowered to issue the proclamation in virtue of his authority as commander-in-chief of the army and navy of the United States. According to Mr. Hamilton, the authority of the president under this clause of the constitution is nominally the same with that of the king of Great Britain, but in substance it is much inferior to it. It amounts to nothing more than the supreme command and direction of the military and naval forces as first general and admiral of the confederacy. The doctrine now advanced, however, engrafts upon the executive department new, undefined, ideal powers not enumerated in the constitution, and contrary to the genius of republican government. It assumes that a state of war utterly abrogates every guarantee provided for the security of property, at the discretion of an irresponsible executive. When combinations are formed to resist the execution of the laws, too powerful to be suppressed by the ordinary course of judicial proceedings, the president is authorized to call forth the whole military and naval power of the country. In such case the war is still against individuals, and not against communities and States. Confiscation and forfeiture may follow trial and conviction of the citizen. But it cannot be denounced against

entire communities and States—the innocent equally with the guilty—without trial and conviction.

The supreme court of the United States, in a late case, in unmistakable terms, repudiates the idea that any department of the government, in war any more than in peace, can exercise powers not expressly granted by the constitution. In *Ex parte Milligan*, 4 Wall. (U. S.) 121, the court uses this strong and patriotic language. "The constitution is a law for rulers and people in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the art of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. The theory of necessity, on which it is based, is false; for the government within the constitution has all the powers granted to it, which are necessary to preserve its existence."

The supporters of the president's proclamation, however, invoke another principle in its support, which has an important bearing in this case. They maintain, what is undoubtedly true, that the parties to a civil war stand precisely in the same predicament as two independent nations, who acknowledge no superior, have recourse to arms; and that the late struggle between the two sections being of that character, it was competent for the Federal authorities to exercise belligerent powers, and to treat the people of the southern States as public enemies engaged in a national war; and consequently, that all persons of every age, sex and condition, residing within the territory occupied by the Confederate forces, might be justly considered, and were, in fact, considered as public enemies, and subject to all the laws of war; one of these is, that the federal government had the right not only to coerce the southern section by force, but to cripple its resources by the seizure and confiscation of every species of property which might have been made useful in the struggle. And in the case of slaves, they might be justly emancipated as a means of weakening the enemy and terminating the struggle.

In the first place, it is by no means certain that this principle of belligerent occupation applies to the emancipation of slaves. There is very high authority for a contrary doctrine. At the close of the Revolutionary war a claim of indemnity for slaves taken by the British forces was instituted by the United States in behalf of the

Henderlite v. Thurman.

owners, and was successfully maintained. And in the negotiations after the close of the war of 1812, Mr. Adams, then Secretary of State, took the ground that emancipation of slaves was not a legitimate mode of warfare, and the British government ought to restore the property or to indemnify the sufferers by its loss. American State Papers, vol. 11, p. 245.

Conceding, however, this right of emancipation, and giving to the proclamation all the effect of a war measure between independent nations, it is clear it could not operate in regions beyond the control of the Federal authorities. It is laid down by all the writers on international law, that the right of appropriating or confiscating the property of the enemy depends upon belligerent occupation. The proclamations and manifestoes of one power can never have any effect within the dominions or possessions of the other not embraced by the lines of conquest and occupation. The authority of the invader extends no further than his possession. His title rests upon force, and is measured by it. This is an universal principle acknowledged by all.

As a war measure then, the proclamation of President Lincoln could only have the effect of emancipating such slaves as came within the control of the Federal armies. The authorities upon this point are abundant. In his notes to Wheaton, Mr. Dana uses the following language: "It will be observed, that this order of emancipation was not a legislative act of the law-making power of the Union; but an act of the president, in his character as commander-in-chief, and a military measure. Although the language of the proclamation is general, and in the present tense, as if giving a legal *status* of freedom from its date to all slaves in the designated States; still, from the nature of the case, it would seem that, being a military measure by a commander-in-chief, who had no general legislative authority over regions of country not in his possession, it could not operate further than as a military order. From that time all slaves coming under the control of the forces of the United States, in the manner recognized by the law of belligerent occupation, were to be free.

And in the case of *Cornett v. Williams*, in the circuit court of the United States for the State of Texas, Judge DUVAL held substantially the same views. He said: "I have always regarded the proclamation of the president, issued on the 1st of January, 1863, declaring the negroes free, as a war measure. The president did

Henderlite v. Thurman.

not lose his right to issue that proclamation upon any clause of the constitution, or even any act of congress. It was justified by the necessities of war; and as commander-in-chief of the army and navy of the United States, he resorted to it, as he himself declared, as a war measure. Its operation and effect depended wholly upon the success of the national arms. The negroes were set free not by the mere declaration of the president that they were so, but by force of arms. Hence I have always supposed that slaves who occupied certain sections of the country, say in Virginia and Tennessee, and who first fell under the armed control of the Union, were free sooner than those in Texas or the extreme south." These views are supported by numerous cases. *United States v. Rhodes*, 7th circuit for the State of Kentucky; *Slaback v. Cushman*, 12 Fla. 472; *Leslie v. Langham's Ex'ors*, 40 Ala. 524; *Harrell v. Watson*, 63 N. C. 454; *Dorris v. Grace*, 24 Ark. 326; *Hall v. Keese*, 31 Texas, 504; *Pickett v. Wilkins*, 13 Rich. S. C. Eq. 366; *Haslett v. Harris*, 36 Ga. 632.

We have the most satisfactory evidence that Mr. Lincoln himself entertained the same opinion in regard to the effect of his proclamation. In a message to the Federal congress, he said: "I repeat the declaration made a year ago, that while I remain in my present position, I shall not attempt to retract or modify the emancipation proclamation; nor shall I return to slavery any person who is free by the terms of the proclamation or any act of congress." And in the Hampton Roads conference, being asked by Mr. Stephens what effect that proclamation would have upon the *institution* of slavery in the States therein designated, he said that was a judicial question. His own opinion, however, was that, as the proclamation was a war measure, it would be held to apply only to such slaves as had come under its operation while it was in active exercise.

Upon the whole, I think we may safely conclude, both upon reason and authority, that as the negroes sold under the decree in this case were, at the time of said sale, occupying a territory exclusively under the control and within the lines of the Confederate government, the rights of the owners were in no manner impaired or affected by the proclamation. They were slaves, to every intent and purpose, at the time of their purchase by the appellant's intestate — so treated and recognized by the laws and authorities of the country. They were the property of appellant's intestate at the time of their emancipation, and the loss resulting therefrom

must fall on him. This principle was distinctly affirmed in *Mittelholzer v. Fullarton*, 6 Adol. & Ellis (N. S.) 989, 51 Eng. C. L. R. That was an action for the recovery of the price stipulated to be paid for fifty-three apprenticed laborers. The defense was, that the laborers had been set free by act of the Colonial government in British Guiana, where the apprentices were. The court held the plaintiff entitled to recover, though the apprenticeship was determined by the legislature before the purchase-money became due. And this upon the ground that the property having passed, and being destroyed by a *vis major*, the loss must fall upon the proprietor when it occurred.

Another ground taken by appellants is, that contracts for the sale of slaves made since 1st of January, 1863, are void upon reasons of public policy. I do not understand it is claimed that such contracts are founded in moral turpitude, but that they are opposed to the national policy and institutions, and for that reason should not be enforced. It is a general rule that the validity of a contract is to be determined by the law of the place where it is made. If valid there, it is by the law of nations held valid everywhere. The exceptions to this rule are found in those cases in which the contract is immoral or injurious to the State or its citizens. Contracts, however, for the sale of slaves, entered into in States which allow slavery, are enforced in countries which regard slavery as contrary to the principles of justice, humanity, and natural right. This rule is founded upon the idea that as slavery is not in violation of the general laws of nations, if any State thinks proper to establish and continue its existence by its own laws, every State will take notice of and give effect to contracts sanctioned by such laws. There are numerous decisions in support of this principle. Thus, in *Madrazo v. Willes*, 3 Barn. & Ald. 353, 5 Eng. C. L. 313, it was held, that a foreigner who is not prohibited by the laws of his own country from carrying on the slave trade may, in a British court of justice, recover damages sustained by him by reason of the wrongful seizure by a British subject of a cargo of slaves on board of a ship employed by such foreigner in carrying on the African slave trade. It was so held, although British statutes at the time denounced the traffic as inhuman and unchristian, and inflicted the severest penalties upon British subjects engaged in it. Best, J., with whom the other judge concurred, said: "It was impossible to say the slave trade was contrary to the law of nations.

Henderlite v. Thurman.

Most of the States of Christendom had consented to its abolition; but Spain had reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not be legally interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this country for any injury sustained by them from such an interruption." And in the *Commonwealth v. Aves*, 18 Pick. 193, Chief Justice SHAW declares, that in pursuance of a well-known maxim, that in the construction of contracts the *lex loci contractus* shall govern, if a note of hand made in New Orleans were sued on in Massachusetts, and the defense should be that it was a bad consideration, or without consideration, because given for the price of a slave sold, it may well be admitted that such a defense could not prevail, because the contract was a legal one by the law of the place where it was made.

These principles apply with peculiar force to contracts for the sale of slaves entered into at a period when the institution was recognized and protected by the fundamental laws, and sanctioned by the public sentiment of the State. It would be monstrous to hold that a contract, perfectly fair and legal when made, can become illegal, or be held contrary to public policy, by reason of a subsequent alteration of the laws and constitution of the State. At the time of the purchase in this case slavery was still an established institution of Virginia, recognized and sustained both by the Richmond and Wheeling government. Nor was its existence contrary to the public policy of the United States government. It still prevailed in the States claiming to be loyal to that government. Congress had not attempted to interfere with it anywhere. Its legislation related only to such slaves individually as came under federal control. It is true that the proclamation asserted the emancipation of all the slaves within the designated States. In this respect, as has been seen, it was utterly without authority. The powers therein assumed were not conferred, nor were they confirmed by the legislative department. The proclamation was issued not because slavery was believed, or even asserted, to be unjust or opposed to public policy, but avowedly as a war measure — a military necessity essential to the success of the federal arms. In regions of country under confederate control it had no more effect than a manifesto confiscating all the real and personal property in the Southern States. In all these regions slaves were treated as property by the laws, by the government, and by the people. They

were administered by executors; they were sold under executions and decrees of courts; they passed by bequest and distribution; they were the subject of purchase and sale amid all classes of society, in every form of investment, traffic and speculation. It would not be extravagant to say, that during the four years' war alone the investments in slaves amounted to millions. We are now told that public policy requires the courts to annul any and every contract entered into during this period, based upon the sale of property thus recognized and sanctioned for generations by the sentiments, the laws and the tastes of the people of Virginia. The proposition involves, in my judgment, an admission derogatory to our whole previous history. Notwithstanding the institution was recognized as lawful and constitutional by both State and federal government, was sustained by public sentiment, was interwoven with the entire framework of society, and was believed by men eminent for wisdom and piety to be in accordance with the principles of religion, humanity and justice; notwithstanding all this, because it has been destroyed by paramount force, we are expected not only to give it up without a murmur, but to surrender all our previous convictions, to yield our faith and consciences to the keeping of others, and henceforth to believe that slavery was wrong in itself—a curse upon our country—a moral leprosy which corrupted the life-blood of the nation. The proposition now advanced means this, or it amounts to nothing. If slavery was lawful—if it was not opposed to good morals and national honor—it is idle to say that the destruction of the institution can impair or affect contracts made during the period of its legal and constitutional existence.

It is worthy of notice, that in nearly all the States in which this question has been raised, the validity of this class of contracts has been fully sustained. Georgia, Arkansas and Louisiana are exceptions. But in these States the decisions were based avowedly upon the provisions in their State constitutions, prohibiting the courts from rendering judgment of recovery in such cases. The supreme court of the United States reversed the decisions rendered by the Georgia and Arkansas courts, upon the ground that these provisions impaired the obligation of contracts. I understand three of the judges dissented upon the ground the contracts were void upon reasons of public policy. A large majority of the court sustained the validity of the obligations given for the purchase-money, though

Henderlite v. Thurman.

the reasoning of the court on this branch of the subject is not given. It was argued, however, that as the purchaser was deprived of his slaves by the act of the State, so by the act of the State he should be relieved of the obligation to pay for them. The gross injustice of the government, in requiring the citizen to pay for property wrested from him by the sovereign power, has been strongly pressed upon our consideration. In the first place, the emancipation of slaves in Virginia was not the act of the State, nor in any manner effected by its agency. It did not depend upon, nor was it the result of, the ratification of the thirteenth amendment by the State. The effect of that amendment was merely to prohibit the institution, for the future, in Virginia. The slaves in the State were as absolutely free at the close of the war without as with that amendment. They were emancipated by force of arms by the conquest and subjugation of the south. All men knew the fact, and all acquiesced in the result. The State is, therefore, not in the predicament of compelling her citizens to pay for property of which she has deprived them.

But the argument upon this point is founded upon some confusion of ideas in respect to the functions of the judicial and legislative departments. The constitution declares that the citizen shall not be deprived of his property without due process of law; nor shall private property be taken for public use without just compensation. If, however, by an act of sovereign power, private property is seized and confiscated, the question of compensation or indemnity is addressed not to the judicial, but to the legislative department. Whether the citizen is entitled to redress, and the measure of such redress involve political considerations with which the courts have no concern. They may pronounce the act of seizure unconstitutional, and they may decree restitution in cases falling within their appropriate jurisdiction. But they cannot annul a contract and relieve a purchaser of his obligation to pay, because the government, by usurpation and violence, has confiscated the property purchased, without making just compensation. They can no more discharge an obligation to pay for a slave emancipated than for a horse, or any other chattel taken by the government agents, or seized by invading armies. The purchaser of a slave, long before the war, may, with equal propriety, claim an abatement of the purchase-money, upon the ground of a failure of title and consideration by act of the government. If he has already paid, he would, for the same

reason, be equally entitled to recover back such share or proportion of the purchase-money as would compensate him for the loss sustained.

To these results we are inevitably conducted by the proposition of appellant's counsel. The entire argument is based upon a misconception of the effect of a warranty. Take the case of the sale of a slave made during the war, with the usual covenant that "he is a slave for life." What is the effect of these words? Simply that the negro sold had then no valid claim to freedom, with either a present or future right of enjoyment; that his political and personal *status* was that of a slave, under the constitution and laws as they then existed. The vendor did not mean to warrant that the laws allowing slavery would never be changed. Whether emancipation was effected by the conquest and subjugation of the South, or by operation of the constitutional amendment, it was an act of supreme power — of sovereign authority. It can scarcely be supposed the vendor intended to give, or the vendee to require, a warranty against the exercise of such sovereign authority. It was, doubtless, upon this principle the case of *Osborne v. Nicholson* was decided. Here the plaintiff sued on a note given in 1861, the consideration of which was a negro slave, warranted a slave for life. Article 15, section 14, of the Constitution of Arkansas, which went into operation in 1868, forbids any recovery on such contracts, and accordingly the supreme court of that State gave judgment for the defendant. Upon an appeal to the supreme court of the United States, it was held that the contract being valid when made, was enforceable in the courts, and that the emancipation of the slave being an exercise of sovereign power by the State, was not a breach of the warranty, and did not invalidate the contract.

Let it be conceded, however, that a citizen may insure against the act of his government. It is not to be presumed that he intended to do so. To warrant such an interpretation of the contract, the language should be plain and unequivocal. It ought to appear that he had reference to such a contingency. To construe the ordinary formulas used in contracts of sale as constituting such warranty, would be to violate the settled rules of construction, and to impose upon the vendor a liability never contemplated by either of the parties. No one will seriously maintain that in a conveyance of real estate a warranty of title or covenant for quiet enjoyment, will be held to be broken by the exercise of the right of domain on the part of the State. The reason is, that, in the sale and purchase of prop-

erty, parties are presumed to contract with reference and in subordination to the sovereign authority to divest the title of the owner when the public interests require it. Such conditions are always implied in every sale, and must be presumed to be known to all, and recognized by all, and are, therefore, never inscribed in the agreement of the contracting parties. Whether the power in any case has been constitutionally exercised or not; whether the property of the citizen has been arbitrarily wrested from him by violence and wrong without compensation, are questions between him and the government. They cannot affect or alter the liability of the vendor and convert his warranty into a policy of insurance against the act of the government.

These considerations apply with peculiar force to the sale of slaves after the date of President Lincoln's proclamation. After that period it was well understood in the south, that the success of the Federal arms would be the doom of slavery. All classes of society appreciated this peril to which they were exposed. Parties bought and sold and partitioned estates in view of this contingency. With many confident in the expectation of ultimate success, this species of property was considered the best investment which could be made. By others who held to the idea that when the cause was lost all else was lost worth having, slave property was regarded as safe and valuable as any other in the States south. Others again made large purchases from the necessities of their position or a desire for speculation and gain. Whatever may have been the motives of purchasers, it is impossible to say that either party understood that the loss of the slaves by the results of the war would affect the obligation of the contract. If it was so understood it was expressed in the agreement by words of plain and unambiguous import. These considerations, it seems to me, effectually dispose of the argument in respect to the failure of consideration. If there has been such failure, it was not because of any defect in the title of the vendor at the time of sale. It is the title of the purchaser that was destroyed, not that of the seller. If the slave had escaped, or had been taken from the possession of the purchaser by superior numbers within a short period after the sale, the result would have been the same. In either case the purchaser acquired all he contracted for, but his enjoyment was not commensurate with his expectations. His title was perfect, but it furnished no security against the might of conquering armies.

In the present case there cannot be the shadow of a difficulty. The slaves were purchased at a judicial sale, as to which the doctrine of *caveat emptor* applies in all its strictness. The appellants purchased with full knowledge of all the facts, and they assumed all the risks attending the acquisition of this species of property in the then existing condition of the country. The appellant's intestate was one of the parties plaintiffs in this suit, asking for a sale of the slaves upon the ground that partition could not be conveniently made. The appellees were infants and non-residents at the time, taking no part in the suit, and probably ignorant of its existence. In no view can they be held responsible for the loss sustained by the purchaser. I think, therefore, the circuit court did not err in refusing to vacate the bonds executed by appellant's intestate for the price of the slaves sold under the decree of September, 1863.

Although not entitled to all the relief asked for by him, the appellant has the right to have adjudicated the question as to the amount actually due by his intestate upon said bonds. It is true that judgments have been recovered thereon. The suit, however, is still pending in the chancery court, which has complete jurisdiction to ascertain and settle the rights of all the parties before the court. It cannot be precluded from so doing by the fact of the rendition of judgments upon the bonds given by the purchaser under its own decree. It is claimed by the appellant, that contracts were entered into with reference to Confederate States treasury notes as a standard of value, and the bonds are payable in that currency; and this is denied by the appellee.

As the latter have the evidence afforded by a judgment in their favor, and as there is no positive proof in the record showing the kind of currency stipulated to be paid, or with reference to which the purchase was made, it would be premature in this court to undertake now to decide these matters of controversy. The appellant should, however, have an opportunity of establishing this ground of defense. As this point was not distinctly presented in the court, nor any claim to relief based upon it, this court can only affirm the decree with costs, with directions that an inquiry be instituted in the circuit court, if desired by either of the parties, as to the kind of currency in which the bonds are payable, or with reference to which they were entered into as a standard of value.

Decree affirmed.

Beery v. Irick.

BEERY V. IRICK.

(23 Gratt. 484.)

Removal of cause from State to Federal courts.

In an action pending in a State court, in which some of the plaintiffs were non-residents of the State and the others residents, the non-residents moved to have the cause removed into the United States circuit court under act of congress of March 2, 1867. *Held*, that the cause could not be removed.

A cause cannot be removed from a State to a Federal court, pending an appeal from a decree upon the merits. (*See note, p. 545.*)

THE motions were made in two suits in equity — Beery against Irick and Bushong against Newton — commenced in the circuit court of Augusta. Some of the plaintiffs in both suits were residents of Virginia, while the others were not. A final decree in both cases was made in the circuit court, and an appeal was taken by the plaintiffs in one case and by the defendants in the other. Pending the appeal the non-resident plaintiffs moved to have the cause transferred into the United States circuit court.

Mr. Fultz, for the motion.

Shaffey & Bumgardner, Baldwin & Cochran, opposed.

CHRISTIAN, J. In these two causes a motion is submitted by certain non-resident parties (in the first-named cause, by one of the appellants, and the other by three of the appellees), to remove them from this court, where they are now pending upon appeals, to the circuit court of the United States for this district.

The application for removal is made under the act of congress of March 2, 1867. "The act of July 27, 1866, for the removal of causes from State courts is hereby amended as follows: That where a suit is pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of \$500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit

stating that he has reason to and does believe, that from prejudice or local influence he will not be able to obtain justice in such State court, may, at any time *before the final hearing or trial of the suit*, file a petition in such State court, for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony and other proceedings in said court, and doing other such appropriate acts as, by the act to which this is amendatory, are required to be done upon the removal of a suit into the United States court; and it shall thereupon be the duty of the State court to accept the surety, and proceed no further in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process."

If the petitioners in the cases before us have brought themselves within the provisions of this statute; if, in other words, they are such parties as the statute describes, and this tribunal in such a State court as is referred to, in its terms, then it is a matter of right to the petitioners to have their cause removed to the circuit court of the United States; and this court has no discretion on the subject. To determine these questions, it becomes necessary to inquire into and ascertain the true construction of the act of congress of March 2, 1867, and those acts of which it is amendatory.

The jurisdiction of the Federal courts is clearly defined by the constitution of the United States and the laws of congress, and it is a proposition too clear to admit of argument or doubt that no cause can be removed into the Federal courts from a State court except it be a cause of which, from the relation of the parties or the subject-matter of the controversy the Federal court could have originally taken the jurisdiction.

It is perfectly obvious that no suit can be removed to the national courts which might not by the constitution of the United States have been originally commenced in one of these courts. It was never intended by the act of congress known as the judiciary act, and the acts amendatory thereof, to extend the jurisdiction of these courts over causes brought before them on removal beyond the limits prescribed to their original jurisdiction; and such is the judicial construction which has uniformly been given to these statutes.

Beery v. Irick.

It may, therefore, be safely assumed, that all the decisions affecting the original jurisdiction of the United States courts, in the classes of cases which may be removed, are equally applicable to them as the subjects of removal. Conkling's Treatise, 177, and cases there cited.

It is too well settled to require a citation of authorities to support the proposition, that where the jurisdiction of the United States courts depends upon the citizenship of the parties, all the plaintiffs must be competent to sue and all the defendants to be sued in said courts.

The expression used in the judiciary act, "or where the suit is between a citizen of the State where the suit is brought and a citizen of another State," means, obviously, that each distinct interest should be represented by persons, all of whom are entitled to sue or may be sued in the Federal courts; that is, when the interest is joint, each of the persons concerned in the interest must be competent to sue or be sued in those courts. *Strawbridge v. Curtis*, 3 Cranch, 267; *Corporation of New Orleans v. Winter et al.*, 1 Wheat. 91; *Wickliffe v. Eve*, 17 How. (U. S.) 468; *Moffat v. Saley*, 2 Paine, 103.

In both of the cases which are now sought to be removed to the circuit court of the United States, a part of the plaintiffs are citizens of other States and part are citizens of Virginia. In the case of *Beery v. Irick*, one of six plaintiffs is a citizen of the State of Indiana and the remaining five are citizens of Virginia.

The interests of these plaintiffs in both cases are so blended and tied up together, and so connected with the interests of the defendants in the two chancery causes respectively, in which they are all made parties, that it is impossible that their rights can be adjudicated without having all the parties before the same tribunal. It is obvious, therefore, that in neither case could the Federal courts take original jurisdiction, because they are both cases where the jurisdiction depends altogether on the citizenship of the parties, and a part of the plaintiffs are citizens of Virginia, and a part citizens of other States; and it is manifest their interests cannot be separated.

If, therefore, the motion now made here in the appellate court had been made in the courts below (circuit courts of Rockingham and Augusta), and before the final hearing, it ought not to have been entertained, because the cases were not such as could have been originally brought in the circuit courts of the United States.

Beery v. Irick.

Hubbard, etc., v. Northern R. R. Co., 3 Blatchf. 84; S. O., 25 Vt. 715; *Wilson v. Blodget*, 4 McLean, 363; *Fisk v. Chicago, etc., R. R. Co.*, 53 Barb. 472.

In the last-named case it was distinctly decided that "unless all the plaintiffs are citizens of the State in whose court the suit is brought, and all the defendants citizens of a State other than that, the case cannot be removed to the United States court."

But in the cases before us, there was a final decree by the court below, and no motion was submitted for a removal while pending in that court. But the motion is made here in the appellate court, for the first time, after a *final hearing* of the causes in the court below. In the one case there was a decree in favor of the petitioner, in the other, a decree against the parties asking for removal.

If the cases before us were such cases as could be removed at any stage of the proceedings to the circuit court of the United States, it is clear that the motion comes too late when made in the supreme appellate tribunal of the State. The act provides that the non-resident party to a suit in a State court between a citizen of that State and a citizen of another State, shall be entitled to a removal of his cause to the next circuit court of the United States, to be held in the district where the suit is pending, on making the proper application "at any time before the final hearing or trial of the suit."

The question we have to consider is (admitting for the time that it is a proper case for a removal), was the application made before the "final hearing or trial, within the meaning and intent of the statute.

The word "final" applies to and qualifies the word "hearing," and not the word "trial." In the act of 1866, the language is "before trial or final hearing." The transposition of the words in the act of 1867 was probably accidental, and not affecting, nor designed to affect, any change in the meaning. The words "final hearing" are ordinarily applied to cases in equity, while the word "trial" is applied to actions at law. The obvious and unmistakable intention of the statute was to require a party desiring a removal to do so before trials in action at law, and before a final hearing in suits in equity. In the language of the court, in *Akerly v. Vilas*, 1 Abb. U. S. Dist. Ct. 293: "The reason and justice of this construction are apparent. Only the non-resident can apply for it. And it would con

Beery v. Irick.

stitute the very essence of injustice to give him the right to experiment upon the decisions of the State tribunals, obtaining those which, if in his favor, would be binding and conclusive upon the other party, but which, if against himself, he could repudiate and take his chances again in a new tribunal. The statute did not intend to provide for any such wrong; but, on the contrary, clearly designed to exclude the possibility of it by requiring the application to be made before trial or final hearing." Id. 293, 294.

It follows, therefore, that if the application for removal had been made in the court below after the decrees were pronounced, adjudicating the rights of the parties and settling the merits of the controversy, such a motion could not have been entertained under the express terms of the statute. Is the case different because these decrees have been superseded and brought before this court for review on appeal? We think not. There has been a final hearing of the cases in the court below. They are here for review, and the question before this court is, shall these final decrees be reversed or affirmed? If they can be now removed to the circuit court of the United States, the same questions will be presented to that court, and the circuit court of the United States must either review the cases upon the records as they stand upon the docket of this court, and determine whether the decrees shall be reversed or affirmed, or it must set aside the decrees of the State court, and try the cases *de novo* in the Federal court. If the theory of the learned counsel for the petitioners be true, the Federal court must take one or the other course. He does not tell us which. We think it can take neither. It never was the object of the statute to *provide for a review* of the decisions of a State court, but simply for the exercise of an election by a party to a suit in a State court to transfer it to another court of original jurisdiction for trial. The design manifestly was to authorize an election between the two tribunals, not to give him a chance at both. Any other construction would be to confer upon the Federal courts, whose jurisdiction is carefully limited by the constitution of the United States, an extraordinary and incongruous appellate jurisdiction, by which the judgment or decree of a State court, solemnly pronounced in a case where it had the undoubted jurisdiction, could be reviewed, reversed and annulled by a Federal court.

Such a construction would permit a party who has deliberately chosen his tribunal, after years of litigation in a State court, where

the decision, if in his favor, would bind the other party, if against him, to take another chance in another forum, to repudiate the authority of the tribunal he has chosen, after a final hearing of his cause, by invoking the aid of another State court, the supreme appellate court, to enable him to get his cause before a Federal court.

In one of the cases before us the non-resident petitioner had failed in the court below upon the final hearing of his cause, and there was a decree against him. It will be conceded by his own counsel that he could not *then*, without obtaining an appeal, have removed the cause to the Federal court. It was too late by the express terms of the statute. He then invokes the aid of this court, upon the ground that the decree against him was erroneous. An appeal is allowed him by this court, or one of its judges; and thereupon he files his petition and affidavit that "he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice" from this court, whose appellate power has been invoked, and granted, to relieve him against a decree which he complains is erroneous. If the appeal had not been allowed, the case, confessedly, would have been at an end, and could not have been removed to the Federal court. He prays an appeal, ostensibly that the decree may be reviewed and reversed by this court, and when he obtains it, he seeks to make this court the supreme appellate tribunal of the State, the mere conduit through which he may travel to a Federal court. Such a course is unwarranted by any law, by any decision of any court, State or Federal, and is in conflict with the express terms of the act of congress which, in effect, declares that no case shall be removed from the State courts to the Federal courts *after trial and final hearing*.

Such a course of practice would be to substitute the circuit court of the United States, as an appellate court to the circuit of the State, in the place of that supreme appellate court constituted by the constitution and laws of this State as the court of the last resort. Such unprecedented and dangerous jurisdiction in the Federal courts will never be recognized by this court, unless the very letter of the law imperatively requires it, and unless such law, if enacted by congress, shall be declared by the supreme court of the United States to be consonant with the constitution of the United States, which expressly limits the jurisdiction of the Federal courts.

Beery v. Irick.

We are of opinion that the motions for removal in both cases be overruled.

NOTE.—The Supreme Court of the United States decided in the "*Sewing Machine Companies Case*" (9 Alb. Law Jour. 203, not yet reported in the regular series) that to effect the removal of a cause from a State to a Federal court, under the acts of congress for that purpose, all of the plaintiffs or all of the defendants, as the case may be, must be non-residents, and must join in the petition for the removal.

The opinion in that case is of such general interest and importance that we give it in full.

The action was brought by the Florence Sewing Machine Company, a Massachusetts corporation, in the supreme judicial court of that State, against the other companies, to recover certain sums of money. The Grover & Baker Company was a Massachusetts corporation also, but the other defendant corporations were foreign. The defendants applied for a removal of the cause to the circuit court of the United States. The court below held that one of the defendants being a resident of the State with the plaintiffs, the removal was not authorized.

Mr. Justice CLIFFORD delivered the opinion of the court. Original cognizance of all suits of a civil nature, at common law or in equity, is given to the circuit courts by the eleventh section of the judiciary act, concurrent with the courts of the several States, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500 * * * and an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State, subject, however, to the restriction that no civil suit shall be brought before any circuit court against any inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. 1 Stat. at Large, 78.

Suits commenced in a State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, may, under the twelfth section of the same act, be removed for trial by the defendant into the circuit court for the same district, if the matter in dispute exceeds the sum or value of \$500: provided the defendant file a petition requesting such removal at the time of entering his appearance in the State court, and offer good and sufficient surety that he will enter copies of the process against him in such circuit court on the first day of its next session, and for his appearance, and that he will give special bail in the case if such bail would be requisite in the State court. 1 id. 79.

Jurisdiction in such a case is concurrent between the proper State court and the circuit court for the same district, and the provision is that such a suit, if commenced in the State court, may be removed by the defendant for trial into the circuit court, subject to the conditions before mentioned, the privilege being given to the defendant only, as the plaintiff, when he institutes his suit, may elect in which of the two concurrent jurisdictions he prefers to go to trial.

These expressions in the act of congress, where an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State, says MARSHALL, Ch. J., the court understands to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the Federal courts; or, in other words, that where the interest is joint, each of the persons concerned in that interest must be competent to sue or be liable to be sued in the court to which the suit is removed. *Strawbridge et al. v. Curtis et al.*, 3 Cranch, 297; *Conolly v. Taylor*, 2 Pet. 564; *Curtis' Com.*, § 75.

All of the complainants in that case were citizens of Massachusetts, and so were all of the respondents, except one, who, it was admitted, was a citizen of Vermont. Due service was made upon the resident respondents, and the record showed that the subpoena had also been served upon the other respondent in the State where he resided. Want of jurisdiction was set up by the respondents in the circuit court, and the judge presiding in the circuit court entered a decree dismissing the bill of complaint. Appeal was taken to the supreme court, and the supreme court unanimously affirmed the decree of the circuit court.

Beery v. Irick.

Repeated decisions have since been made by this court and by many other courts, State and Federal, to the same effect. Prior to the case of *Railroad v. Lorton*, 2 How. 550, it had frequently been held by this court that a corporation aggregate, as such, was not properly included in the word "citizen," as used in the judiciary act, and consequently that such a corporation, if regarded merely as an artificial being, could not sue in the Federal courts, yet the court decided, in several cases, that the court would look beyond the corporate character of such an artificial being to the individuals of whom it was composed, and if it appeared that they were citizens of a different State from the party sued, that the suit, whether an action at law or a suit in equity, could be maintained in the proper circuit court.

Cases of that description are quite numerous, and yet, in all of them, it was held by this court that all of the corporators must be citizens of a different State from the party sued, else the jurisdiction could not be sustained. *U. S. Bank v. Deveau*, 5 Cranch, 61; *Railroad Bank v. Slacomb*, 14 Pet. 63; *Irvine v. Lowry*, id. 299; *Bretthaupt v. Bank*, 1 id. 238; *West v. Aurora City*, 6 Wall. 143.

Corporations, it is true, are now regarded by this court as inhabitants of the State by which they are created and in which they transact their corporate business, and it is also held that a corporation is capable of being treated as a citizen for all purposes of suing and being sued in a circuit court, but the rule as modified, in that regard, does not diminish the authority of those cases as precedents, to show that by the true construction of the judiciary act it requires that each of the plaintiffs, if the interest be joint, must be competent to sue each of the defendants in the circuit court to sustain the jurisdiction under the eleventh section of that act. *Marshall v. Railroad*, 16 How. 335; *Railroad v. Wheeler*, 1 Black, 365; *Draughtbridge Co. v. Shepherd*, 20 How. 237; *S. C.*, 21 id. 112; *Coal Co. v. Blatchford*, 11 Wall. 173.

Certain sums of money, it is alleged, in excess of what could properly be exacted by the defendant corporations, had been paid to those corporations by the plaintiffs, and the corporation defendants refusing to refund the amount of such alleged excess the corporation plaintiffs instituted an action at law, in the supreme judicial court of the State, against the corporation defendants, to recover back the amount of the alleged overpayments.

Patent rights, it seems, are owned by the three corporation defendants, for the exclusive privilege to construct, use and vend certain patent sewing machines, and the inference is that the corporation plaintiffs are or have been licensees of the corporation defendants. What the precise terms of the license are or were does not very satisfactorily appear, but it may be inferred that the plaintiffs covenanted to pay to the defendants a certain patent rent or tariff for the use of the patent right subject to be reduced in amount in case the defendants granted licenses to other parties at a lower rate, and the charge is that the defendants did grant licenses to others at a lower rate without making to the plaintiffs the stipulated reduction; that the corporation defendants have ever since exacted the higher patent fee or tariff in violation of the terms of the license.

Payments having been made the plaintiffs commenced this suit to recover back the amount. They joined as defendants the Grover & Baker Sewing Machine Company, which is a corporation established under the laws of Massachusetts; the Wheeler & Wilson Manufacturing Company, which is a corporation established under the laws of Connecticut; and the Singer Manufacturing Company, which is a corporation established under the laws of New York. Seasonable appearance was entered by the company first named at the return term, and they filed an answer within the time required by the rules of the court. Neither of the other corporation defendants entered a general appearance at the return term, but the plaintiffs caused an order of notice to issue to those corporations respectively to appear at the next term of the court, and subsequently filed proof that the order of notice was duly served by publication.

By the return of the marshal, it appears that personal property of those respective corporations was attached on the original process, and the plaintiffs claim that by virtue of the attachment and the due service of the order of notice the State court acquired jurisdiction of all the parties. Subsequently, however, both of the non-real-

Beery v. Irick.

dent corporations appeared and, having obtained leave of the court for the purpose, filed their answers to the action, and on the same day they filed their severa petitions for the removal of the cause for trial to the circuit court for that district. Each of the petitions was accompanied by an affidavit executed by the president of the company, and by a bond of the company in usual form as required by law in such a case. Hearing was had and the State court refused to grant the prayer of the respective petitions, and directed that the parties should proceed to trial, to which rulings the defendants then and there excepted, and the verdict and judgment were for the plaintiffs.

Exceptions were also taken by the defendants to the rulings of the court in the progress of the trial, and to certain instructions given by the court to the jury, but it will not be necessary to re-examine the exceptions taken during the trial, as the only question to be determined under this writ of error is whether the rulings of the court, in overruling the respective petitions for the removal of the cause into the circuit court and in directing that the parties should proceed to trial in the State court, were or were not correct.

Circuit courts do not derive their judicial power immediately from the constitution, as appears with sufficient explicitness from the constitution itself, as the first section of the third article provides that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish." Consequently the jurisdiction of the circuit court in every case must depend upon some act of congress, as it is clear that congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the supreme court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers. *Turner v. Bank*, 4 Dall. 10; *Sheldon v. Sill*, 8 How. 448; *McIntire v. Wood*, 7 Cranch, 506; *Kendall v. U. S.*, 12 Pet. 616.

Congress, it may be conceded, may confer such jurisdiction upon the circuit courts as it may see fit, within the scope of the judicial power of the constitution, not vested in the supreme court, but as such tribunals are neither created by the constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act of congress it is necessary, in every attempt to define their power, to look to their source as the means of accomplishing that end. *Cary v. Curtis*, 8 How. 345.

Federal judicial power, beyond all doubt, has its origin in the constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be, the work of the congress.

Attempt is made in argument to maintain the right claimed by the defendants, to remove the cause for trial in this case from the State court where it was commenced into the circuit court, as being derived under the act of the 2d of March, 1867, which is entitled "An act to amend a prior act entitled 'An act for the removal of causes, in certain cases, from State courts.'"

Reference will first be made to the prior act referred to in the title of the amendatory act, as the prior act followed the judiciary act in many respects, and, like that act, limits the right of removal to the alien defendant and the defendant who is a citizen of a State other than that in which the suit is brought. Subsequent to these preliminary recitals it provides, in effect, that where the suit is commenced in the State court against an alien or by a citizen of the State against a citizen of another State, the non-resident defendant, or the alien defendant, as the case may be, may remove the cause from the State court into the circuit court, even though it appears that a citizen of the State where the suit is brought is also a defendant, if the suit, so far as it relates to the alien defendant or the non-resident defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant; or if the suit is one which, so far as it respects such alien or non-resident defendant, can be finally determined without the presence of the other defendant or defendants as parties in the cause, then and in every such case the alien or non-resident defendant

Beery v. Irick.

may, at any time before the trial or final hearing of the cause, file a petition for the removal of the same, as against the petitioner, into the circuit court; but the provision in the same act also is, that such removal of the cause shall not be deemed to prejudice or take away the right of the plaintiff to proceed, at the same time, with the suit in the State court, if he shall see fit, against the other defendants. 14 Stat. at Large, 308.

Remarks to show that the act referred to contains nothing to support the view that congress intended by it to depart from the essential principle embodied in the judiciary act are hardly necessary, as it is obvious that the language of the act does not empower any defendant, unless he be an alien or non-resident, to remove the cause or to elect any other forum for the trial of the same than the one to which the suit is returnable, nor does it give any sanction whatever to the proposition that the resident defendant shall be compelled or permitted under any circumstances to go elsewhere to answer the suit. Defendants in certain cases may sever, after final judgment, for the purpose of prosecuting an appeal or writ of error, which is effected by a proceeding usually called summons and severance, which will enable one of several defendants, or any number less than the whole, to sue out a writ of error or take an appeal in a case where the other defendants or respondents refuse to join in the petition for the same. *Williams v. Bank*, 4 Wheat. 414; *Wilson's Heirs v. Ins. Co.*, 12 Pet. 140; *Todd v. Dantel*, 16 Id. 321.

Modes of effecting a severance among executors, so that less than the whole number may sue, were also known at common law, but in such a case it was necessary that such a proceeding should be perfected before the suit was instituted. 2 Wms. Ex'rs (4th Am. ed.), 1183, note f; *Goodyear v. Rubber Co.*, 2 Cliff. 368.

By virtue of the provision under consideration, the alien defendant or the defendant who is a citizen of a State other than that in which the suit is brought is empowered, subject to the conditions specified, without any summons and severance, to remove the cause, as between him and the plaintiff, into the circuit court for trial, leaving the cause, as between the plaintiff and the other defendants, to proceed in the State court where the suit was commenced, wholly unaffected by such removal, the only effect of the removal in such a case being to sever to that extent the defendants in the cause for the special purpose provided in the enactment, but the provision affords no support whatever to the theory set up by the defendants in the case before the court. *Smith v. Rines*, 2 Sumn. 838; *Ward v. Edmonia*, 1 Paine, 410; *Sayles v. Ins. Co.*, 2 Curt. 312; *Hazard v. Durant*, 9 R. I. 608; *Beardsley v. Torrey*, 4 Wash. 286.

Before the passage of that act no removal could be made in such a case, as some of the defendants are by that act supposed to be citizens of the State where the suit is brought, and all the courts, Federal and State, had uniformly decided that unless the cause was removable as to all the defendants it could not be removed at all, as the act of congress contained no provision warranting any such proceeding as summons and severance for any purpose. *Moffat v. Soley*, 2 Paine, 193; *Bissel v. Horton*, 3 Day, 281; *Tuckerman v. Bigelow*, 21 Law Rep. 208; *Herndon v. Ridgway*, 17 How. 424; *Railway Co. v. Whittton*, 13 Wall. 286.

Unlike the judiciary act, however, the alien defendant or the defendant who is a citizen of a State other than that in which the suit is brought may, under the "Act for the removal of causes in certain cases from State courts," have the cause removed, as to himself, subject to the condition that such severance or partial removal shall not prejudice or take away the right of the plaintiff to proceed, at the same time, with the suit in the State court as against the other defendants, showing that the right of removal is still confined to the alien and non-resident defendant, and that no removal of the cause as to any other defendant can be made under that enactment.

Grant all that, still it is insisted by the defendants that the rulings of the State court in refusing to grant the prayers of their petitions and in directing that the parties should proceed to trial, was erroneous, as the petitions were filed under the latter act of congress, which, as they contend, very much enlarges the right to remove causes from the State courts into the circuit courts for trial.

Important changes, undoubtedly, are made by that act in the law upon that subject, as it clearly extends the privilege to a non-resident plaintiff as well as to a non-resident

Beery v. Irick.

defendant, subjecting both, however, to a new condition wholly unknown in the prior acts of congress, vesting such a right in an alien defendant or in a defendant who was a citizen of a State other than that in which the suit is brought. Where a suit is now pending or may hereafter be brought in any State court in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to believe and does believe that, from prejudice or other local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit court to be held in the district where the suit is pending.

Aliens, it will be seen, are not included in the provision, but the right to petition for the removal is extended to the non-resident plaintiff as well as to the non-resident defendant, in a case where it appears that a resident defendant is sued by a non-resident plaintiff, as in such a case there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, just as much as there is in a case where a resident plaintiff sues a non-resident defendant in his own district, the defendant being found within the same district, and served there with the original process.

Under the judiciary act and the succeeding act for the removal of certain causes, the plaintiff, if he elected to commence his suit in a State court, whether he was resident or non-resident, was bound by his election, nor was it ever supposed that he could subsequently be permitted to remove the cause from the State court into the circuit court in ordinary circumstances, as neither of those acts of congress vest in the plaintiff any such right, nor do they contain any language to warrant the conclusion that congress ever intended to confer upon a plaintiff any such power. Non-resident defendants and alien defendants might cause such removal to be made, but under the judiciary act the condition was that such a defendant must file his petition requesting such removal at the time he entered his appearance in such State court; which condition is relaxed in this act, so far as it respects non-resident defendants and non-resident plaintiffs, and it is provided that the right may be exercised "at any time before the final hearing or trial of the suit."

Viewed in the light of these suggestions it is clear that it is a mistake to suppose that the act will operate to limit the right conferred by the judiciary act, unless the court give it the broad construction assumed by the defendants, as it extends the right to a non-resident plaintiff as well as to a non-resident defendant, and allows both to file the necessary petition at any time before the final hearing or trial of the suit, leaving the case of the alien defendant unaffected by any of its provisions.

More regulation, such as requiring the cause of removal to be stated, and that the petition should be supported by an affidavit, is not sufficient change in the principle of the judiciary act to support the proposition, as the great purpose of the new enactment is to extend the right to a non-resident plaintiff as well as to a non-resident defendant, and to enlarge the time within which the petition may be filed, leaving the alien defendant wholly unaffected by the new regulations.

Apply these rules of construction to the three acts of congress referred to in this case, and it is clear that they will work out the following results: 1. In a case where the suit is commenced by a plaintiff in the court of a State of which he is a citizen, against a defendant who is a citizen of another State, the defendant may remove the cause into the circuit court of that district for trial; 2. Where the plaintiff brings his suit in the court of a State, other than that of which he is a citizen, against a defendant who is a citizen of the State where the suit is brought, the plaintiff may remove the cause into the circuit court under the last-named act. *Beery v. Irick*, 22 Gratt. 485.

Suppose, however, the plaintiff brings his suit in the court of a State other than that of which either he or the defendant is a citizen, the defendant having been found therein and been duly served with the original process, then neither the plaintiff nor the defendant can remove the cause from the State court into the circuit court for trial under any existing act of congress, as in that case there is not controversy between

Beery v. Irick.

a citizen of a State in which the suit is brought and a citizen of another State, nor is the suit one commenced by a citizen of a State in which the suit is brought against a citizen of another State, as the condition is as provided in the judiciary act. Both plaintiff and defendant being non-residents, the acts of congress make no provision for the removal of such a cause into the circuit court for trial.

Unaffected as the judiciary act is by the latest of the three acts mentioned, the law still is that if the suit is commenced against an alien in a State court, he may file a petition for the removal of the same for trial into the next circuit court to be held in the district, at the time of entering his appearance in such State court. Non-resident defendants or alien defendants may also remove certain causes from a State court into a circuit court for trial, under the intermediate act of congress, as before explained. Where the suit is commenced in a State court against an alien, or by a citizen of the State in which the suit is brought against the citizen of another State, the non-resident defendant or the alien defendant, as the case may be, may remove the cause from the State court into the circuit court for trial, even though it appears that a citizen of the State where the suit is brought is also a defendant, if the suit, so far as it relates to the non-resident or alien defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant, or if the suit is one which, so far as it respects such defendant, can be finally determined without the presence of the other defendants as parties in the cause.

Considering the stringent conditions which are embodied in the last-named act, it is doubtful whether it will prove to be one of much practical value, but as it remains in full force it cannot be properly overlooked in this investigation.

Suggestion is made that it is a step in advance of the judiciary act, but the force of the suggestion is not perceived, as it makes no provision that any party shall go into the circuit court for trial except such as may go or be sent there under the twelfth section of the judiciary act. Divest that act of the feature which provides for the severance of the defendants and that which empowers the plaintiff to proceed with the suit in the State court as against the other defendants, and it is exactly the same as the corresponding feature of the judiciary act, except that it extends the time for filing the petition for the removal of the cause from the time the petitioner enters his appearance in the State court to the time of the trial or final hearing of the cause.

Separately considered, the language employed in the "act for the removal of causes in certain cases from the State courts" to describe the parties and the suit in which the alien defendant or the non-resident defendant may remove the cause into the circuit court for trial, is identical with the language employed in the judiciary act, the two provisions differing only in the particulars heretofore sufficiently explained, showing that the well-established rule applies in construing the latter act, that the words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense. *Potter's Dwarria*, 274; *Bac. Ab. Stat. I*; *Pennock v. Dialogue*, 3 Pet. 18; *Cathcart v. Robinson*, 5 Id. 280; *McCool v. Smith*, 1 Black. 469; *Com. v. Hartwell*, 8 Gray. 450; *Ruchamaboye v. Mottichmed*, 33 Eng. L. & Eq. 84; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 638; *Rigg v. Welton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 256.

Such a construction in the case supposed becomes a part of the law, as it is presumed that the legislature, in passing the latter law, knew what the judicial construction was which had been given to the words of the prior enactment. Support, therefore, to the theory put forth by the defendants cannot be derived either from the judiciary act or from the latter act, entitled "An act for the removal of causes in certain cases from State courts." 14 Stat. at Large, 306.

Admit that and still it is insisted by the defendants that they had the right to remove the cause from the State court under the act to amend the act called the removal act. 14 Stat. at Large, 559.

Much stress is placed upon the particular language of that act, which is that "When a suit is now pending or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." Instead of that the corresponding language of the judiciary act is, "If a suit be commenced in any State court * * by a citizen of the State in which

Beery v. Irick.

the suit is brought against a citizen of another State." Different words are certainly employed in the two provisions, but it is difficult to see in what particular the jurisdiction of the State court is lessened by the last act, or in what respect the difference of phraseology supports the theory of the defendants, as "a suit by a plaintiff against a defendant" must mean substantially the same thing in the practical sense as "a suit in which there is controversy between the parties," as each provision includes the word "suit," which applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim; 2 Bouv. Dic. 558; *Weston v. Charleston*, 2 Pet. 41; 1 Curtis' Com., § 73, p. 85; Webs. Dic., "Suit."

Indubitably they differ in this, that it is the defendant only who can remove the cause under the judiciary act, but the last-named act empowers the non-resident plaintiff, in a proper case, as well as the non-resident defendant, to exercise the same privilege, as in the former case, as well as in the latter, there is a suit pending in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the express enactment is that in the case supposed "such citizen of another State, whether he be plaintiff or defendant," if he will comply with the conditions stated, may, at any time before the final hearing or trial of the suit, file a petition for the removal of the cause. *Cook v. Bank*, 1 Lans. 508; *Bryant v. Bick*, 106 Mass. 191; *Cook v. Bank*, 58 N. Y. 96.

Real parties are only empowered to claim that right under either act, and it is equally clear that the right of the defendant cannot be defeated by joining with him a mere nominal party in the action. *Dodge v. Perkins*, 4 Mason, 436; *Ratseau v. Bernard*, 3 Blatchf. 245; *Ward v. Arredondo*, 1 Paine, 410; *Wormley v. Wormley*, 7 Wheat. 451; 1 Curtis' Com. § 74.

Special attention is also invited to the fact that the judicial power conferred by the constitution extends to controversies between citizens of different States, and the proposition is submitted in argument, that it would be competent for congress to pass a law empowering one of a number of plaintiffs, or one of a number of defendants, to remove such a suit from trial from a State court into the circuit court for the same district, if it appeared that the petitioner, whether plaintiff or defendant, was a citizen of a State other than that in which the suit was brought, even though all the other plaintiffs or other defendants were citizens of the State in whose court the suit was pending; but the court is of the opinion that the question does not arise in this case, as the act of congress in question, in the judgment of the court, does not purport to confer any such right.

Were it true that the circuit courts derive their judicial power immediately from the provisions of the constitution, it might be necessary to examine that proposition, but inasmuch as it is settled law that the jurisdiction of such courts depends upon the acts of congress passed for the purpose of defining their powers and prescribing their duties, it is clear that no such question can arise in a case like the present, unless it first be ascertained that congress has passed an act purporting to confer the disputed power. Courts are disinclined to adopt a construction of an act of congress which would extend its operation beyond what is warranted by the constitution; but the suggestion that congress possesses the power to confer a new privilege is not a sufficient reason to induce the court to extend an existing enactment by construction, so as to embrace the privilege, unless the words of the enactment are of a character to warrant the construction.

Either the non-resident plaintiff or non-resident defendant may remove the cause under the last-named act, provided all the plaintiffs or all the defendants join in the petition and all the parties petitioning are non-residents, as required under the judiciary act; but it is a great mistake to suppose that any such right is conferred by that act, where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the State in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right, unless all the plaintiffs or all the defendants are non-residents and join in the petition. *Bryant v. Scott*, 6 N. C. 328; *Hassard v. Durant*, 9 R. I. 609; *Waggener v. Cheek*, 2 Dill. 565; *Case v. Douglas*, 1 id. 200; *Blizby v. Courne*, 3 Blatchf. 73; *Ex parte Andrews*, 40 Ala. 648; *Peters v. Peters*, 41 Ga. 251; *Cook v. State Bank*, 58 N. Y. 113.

Beery v. Irick.

Two cases only, besides the opinion given in this same case in the circuit court, to wit: *Johnson v. Monell*, 1 Wool. 300; *Sands v. Smith*, 1 Dill. 200, are cited to support the assumed theory, neither of which necessarily involved any such question, and the reasons given for the conclusion by the learned circuit judge, on the motion to dismiss the case in the circuit court, are not satisfactory.

Judgment affirmed.

MILLER and BRADLEY, JJ. We dissent from the opinion of the court in this case, in reference to the construction of the act under consideration, and, for this reason, we dissent from the judgment.

REMOVAL BEFORE "THE TRIAL OR FINAL HEARING."—Considerable diversity exists in the decisions as to what is such a "trial or final hearing" as will prevent a removal. In *Akerly v. Viles*, 1 Am. Rep. 106 (24 Wis. 185), it was held too late to remove under the act of March 2, 1867, after trial and judgment, even though the judgment had been reversed on appeal and a new trial ordered; and the same rule was laid down by the supreme court of Ohio, in *Home Life Ins. Co. v. Dunn*, 5 Am. Rep. 642. So, also, in the recent case of *Galpin v. Critchlow*, 13 Am. L. Reg. (N. S.) 187, the supreme judicial court of Massachusetts sustained the same view after a very thorough examination of the authorities. In that case there was a trial on the merits which resulted in a disagreement of the jury; and the court held that no removal could be had under the act of 1867. See, also, *Bryant v. Rich*, 8 Am. Rep. 311 (106 Mass. 180).

However, since the decision in *Galpin v. Critchlow*, and with the opinion in that case before them the supreme court of Rhode Island has decided that a cause may be removed under the act of 1867, after a trial on the merits and a failure to agree. *Clarke v. Delaware & Hudson River Ry. Co.* (to appear in 10 R. I.).

Two recent decisions of the United States Supreme Court have been made on the subject: one in *Stevenson v. Williams* (Chicago Leg. News, May 9, 1874), which, so far as it relates to this point, was as follows, Mr. Justice FIELD delivering the opinion of the court:

"The application of the appellant for the removal of the suit from the supreme court of Louisiana to the circuit court of the United States was made too late, and was properly refused on that ground. The act of congress of March 2, 1867 (14 Statutes at Large, 558), under which the removal was asked, only authorizes a removal where an application is made "before the final hearing or trial of the suit," and this clearly means before final judgment in the court of original jurisdiction, where the suit is brought. Whether it does not mean still more—before the hearing or trial of the suit has commenced, which is followed by such judgment—may be questioned; but it is unnecessary to determine that question in this case.

"After a final judgment has been rendered in the State court, the case cannot be removed to the circuit court of the United States, and "there proceed," as the statute provides, "in the same manner as if brought there by original process," without setting aside the trial and judgment of the State court as of no validity. No such proceeding is contemplated by the act; and since the decision of *Murray v. The Justices of New York*, reported in 9th Wallace, legislation directed to that end, where, at least the trial has been by jury, would be of doubtful validity."

The other case was *Insurance Company v. Dunn*, to appear in 19 Wall., wherein it was held, Mr. Justice SWAYNE delivering the opinion, that the language—"at any time before the final hearing or trial of the suit"—of the act of March 2, 1867, is not of the same import as the language of the act of July 27, 1866, on the same general subject: "at any time before the trial or final hearing." On the contrary, the word "final" in the first-mentioned act must be taken to apply to the word "trial" as well as to the word "hearing." Accordingly, although a removal was made after a trial on merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a State where by statute the party could still demand, as of a right, a second trial, held, that such first trial was not a "final trial" within the meaning of the act of congress; the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the State.—*REP.*

Newton v. Bushong.

NEWTON V. BUSHONG.

(23 Gratt. 686.)

War — belligerent rights — executor — Confiscation of trust property.

An executor during the war received money bequeathed to legatees residing in Indiana, which was afterward confiscated by the Confederate government. *Held*, that the Confederate government had authority as an exercise of belligerent rights to confiscate the property as of an alien enemy, and that act released the executor from his responsibility therefor.

SUIT in equity by Samuel Bushong and others, legatees of Mary C. Bushong, against her executor, John Newton, for the payment of legacies. Mary C. Bushong died in 1860, and John Newton qualified as executor under her will, which was duly admitted to probate. The executor delivered to the various legatees the specific articles to them bequeathed, and September 7, 1860, sold the other personal estate, and on the 1st of July, 1861, made final accounting of the amount in his hands as \$1,720.24.

The will bequeathed to Samuel Bushong, a resident of Indiana, \$100; to Peter V. Bushong, \$400; to Jacob Cox, an infant grandson, \$50; and the residue of the estate to Peter V. and Mary A. Bushong.

The executor showed that when settlement was made, Peter V. and Mary A. Bushong had gone on a visit to their brother in Indiana, which prevented his paying their legacies, and that they did not return until after the war. The money remained in his hands for some time, and until he was ordered by Thomas J. Michie, receiver of the Confederate States, to report the fund for confiscation. The \$100 of Samuel Bushong was confiscated. The balance was not, because of the assurance given, that the other legatees were visiting, to return in a short time, this was deposited in the Central Bank of Virginia, and afterward invested in Confederate bonds. He was ready any time after the settlement to pay over the bonds or money, as the parties preferred. The invested sum did not quite equal the amount due.

The accounts were referred to a commissioner, who reported charging the executor with the whole fund, and crediting with his payments of legacies and directing the payment of \$831.63 to Peter

V. Bushong, \$486.53 to Mary A. Bushong, and the legacies, in full, to Samuel Bushong and Jacob Cox.

The court made a decree directing payment according to the report, and the executor of Newton, who had died in the meantime, appealed.

Sheffey & Bumgarden, for appellant.

Mr. Fitts, for appellee.

STAPLES, J. The important question in this case relates to the legacy of Samuel Bushong, a resident of the State of Indiana. This legacy was, in March, 1862, reported by the executor to a Confederate receiver, and was confiscated as the property of an alien enemy. According to the statement of the executor, the fund had been in his hands since July, 1861, part of the proceeds of the sale of personal estate belonging to the testatrix. There is no evidence of his assent to, or his participation in, the act of confiscation. On the contrary, it is to be inferred that he only made the report and payment because he was ordered so to do by the proper authorities. The question is now presented, whether the payment thus made protects the executor against the claim of the legatee.

In order properly to discuss this question, the acts of confiscation or sequestration, passed by the Confederate congress, must be briefly noticed. The first of these was passed 30th of August, 1861; the second, amendatory thereof, the 15th February, 1862. It is unnecessary to state in detail the various provisions of these acts. It will be seen by a reference thereto, it was made the duty of *every person* having in his possession or under his control the effects of an alien enemy speedily to inform the receiver in his district of the fact. A failure so to do was declared a high misdemeanor, punishable by fine and imprisonment, and also a forfeiture of double the amount, at the suit of the government. It was also provided, that any person who, after giving such information, should fail to pay over and deliver on demand made by the receiver, the money or effects in his hands, shall stand in contempt, and be proceeded against as in other cases of contempt. And the court or judge was authorized to imprison the offender until he should fully comply with the requirements of the act.

Under the provisions of the original act, the court was empow-

Newton v. Bushong.

ered to leave the sequestered property or effects in the possession of the debtor or other person, requiring security for its safe-keeping, and payment or delivery whenever required by the court. The amended act, however, makes a very material change in this respect. That act creates a distinction between persons *in actual possession of*, or *having under their control*, the effects of alien enemies, and persons *owing debts* to alien creditors. In the former case immediate payment or delivery was required to be made to the receiver without qualification or condition. In the latter case payment of interest was only exacted, and no execution could be issued during the war against the debtor who faithfully complied with the statute in giving information of his indebtedness. The reason of this distinction is apparent. A trustee, fiduciary or other person having property or money in his actual possession, or under his control, could not justly demand any delay or indulgence. There could be no valid reason why payment should not at once be made to the receiver. A mere debtor, on the other hand, might be subjected to considerable inconvenience in making such payment, and as by the laws of nearly all the States south, the collection of debts was stayed, the Confederate government extended the same indulgence to parties indebted to alien enemies. In the present case the fund was deposited in bank to the credit of the executor, and was therefore under his control. He was within the express terms of the law, and the question is, was he bound to obey it?

It will be observed that these provisions were of a highly stringent character. That the Confederate government had the power to enforce them, no one familiar with the history of that period will question. It was a government of paramount force, to whose laws and mandates every citizen within its jurisdiction was constrained to yield implicit obedience. Indeed this was conceded in the argument. It was said, however, that this government was an unlawful and treasonable organization, and no act done under its authority prejudicial to the rights of loyal citizens of the United States can be recognized as valid by the courts.

In support of this view, an opinion of Chief Justice CHASE, delivered at Richmond, in *Keppell's administrator v. Petersburg Railroad Company*, is relied on. It seems that Mrs. Keppell was a stockholder in that company, and that a part of her stock was confiscated and sold during the war. In a suit against the company by Mrs. Keppell's administrator, the company claimed a credit for the

dividends paid to the Confederate receiver and to the purchasers of the stock sold. The learned chief justice conceded that if the dividends belonging to Mrs. Keppell had been set apart to her specially, and the money thus set apart had been taken from the officers of the company without their consent, by the application of force, either actual or menaced, under circumstances amounting to duress, the loss must have been borne by her. But nothing of the kind appeared. No dividends were set apart; there was no force, actual or threatened. On the contrary, the conduct of the company afforded a reasonable inference that they were not involuntary accessories to the whole action of the government. The facts of the case are not reported in the volume to which we have been referred. It is, therefore, somewhat difficult to understand what is meant by the expression "application of force actual or menaced, under circumstances amounting to duress." We are not told how far the person holding the effects of an alien enemy was required to go—what amount of resistance he was expected to display in defense of property belonging to a loyal citizen of the United States.

A government of supreme authority denouncing the penalties of fine, imprisonment and forfeiture upon acts of disobedience to its proclaimed will, affords as strong an illustration of "menaced force" as can well be imagined. What does it matter that such a government is unlawful? A citizen may be justified in resisting tyranny and oppression, but he is under no obligation, nor can he be required to engage in a hopeless and dangerous contest with the government under which he lives, however illegal it may be, in defense of property confided to his care either as bailee, agent or executor. In *Thorington v. Smith*, 8 Wall. (U. S.) 1, Chief Justice CHASE declared that obedience to the authority of the Confederate government in civil or local matters was not only a necessity but a duty. Why should a different rule be established with respect to this executor. Had he refused to pay over the money, every one familiar with the history of that period, and the temper of the public mind, knows well the whole power of the courts and the laws would have been exerted against him to enforce obedience. What was he to do under such circumstances? How far was he to go in his resistance to the law? Was he to submit to fine and imprisonment, or would the threat of an attachment for contempt have excused him in surrendering the fund? I think the executor was well justified in refusing to incur these hazards. He wisely declined

Newton v. Bushong.

a contest with a government which the whole naval and military power of the United States could not subdue under four years. We are not disposed, however, to rest the decision of this case upon this narrow and restricted view. It may be placed upon a higher ground. In *Walker v. Christian*, 21 Gratt. 291, 301, Judge MONCURE, speaking for the court, said: "It is immaterial to inquire whether the Confederate government was *de jure* or *de facto* only; and if *de facto* only, for what purpose and to what extent it was a *de facto* government. That it was such a government to a considerable extent and for many purposes, if not entirely and for all purposes, cannot be denied." It is said, however, by an eminent Federal judge that the Confederate government did not possess all the attributes of a government *de facto* in the highest degree. The reason he assigns, is it never expelled the regular authorities from their customary seats and functions. It never held the national capital. It never asserted any authority to represent the nation. The conclusion he deduces therefore is, it must be regarded as an unlawful organization, and all its acts and proceedings for the confiscation of the property of loyal citizens must be treated as absolutely null and void.

The test here suggested may be a correct one, when applied to a people having but one central consolidated government. In such States or communities, as a general thing, the object of every revolutionary movement is to overthrow and expel the existing government, to occupy the capital and give laws to the nation. So long as the organization falls short of this result, it may be a question whether it possesses the attributes of a *de facto* government in the highest degree. However this may be, the test suggested cannot in justice be applied to the Confederate States. They did not attempt or desire to occupy the national capital as their seat of government, nor to give laws to the people of the United States. The whole scope and object of the movement was a separation from the northern States; the formation of an independent confederation; the establishment of a new government over their own people within their own territorial limits and jurisdiction. How eminently successful this struggle was for four years, at least, in the attainment of these objects, let the supreme court of the United States answer. In *Mauran v. Insurance Company*, 6 Wall. (U. S.) 1, the question was presented, whether a northern insurance company was liable for the value of a vessel captured by the naval forces of the Con-

federate government. Mr. Justice NELSON, in discussing the principles governing the rights and liabilities of underwriters in such cases, used the following language: "Still it cannot be denied but that by the use of these unlawful and unconstitutional means a government in fact was erected, greater in territory than many of the old governments of Europe, complete in the organization of all its parts containing within its limits more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions; and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government; such as the treatment of captives both on land and sea as prisoners of war, the exchange of prisoners; their vessels captured, recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers, the same as in open and public war."

Again, elsewhere he declares: "We refer to the conduct of the war as a matter of fact for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country, and hence captures under its commission were among those excepted out of the policy by the warranty of the insured."

All will acknowledge the force of this description, the accuracy and truth of the picture. If the laws and mandates of a government thus organized and powerful will not protect those who were subject to its jurisdiction and yielded it obedience, it is idle to say that the citizens or subjects of a mere *de facto* government in any case can claim exemption under its authority. In *Thorington v. Smith*, Chief Justice CHASE expresses the opinion, that the Confederate government may be classed among the governments of which those established at Castine and Tampico are examples. Let us see, then, what was decided with reference to Castine. It was an American fort captured by British forces in 1814, and held in possession of British authorities until the treaty of peace in 1815. During that period foreign goods were received into the port, under regulations established by the enemy. Some of these goods remained in Castine until after the close of the war. The United States gov-

Newton v. Bushong.

ernment then asserted a right to levy imports and duties upon them. The supreme court of the United States decided this claim could not be sustained; that by the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and enforce. Now, if the learned chief justice be correct in likening the Confederate government to the military occupation of Castine, it would seem that the same results must follow in both cases. The law of paramount force, which protected the citizen against the claim of the United States, would also protect the bailee or fiduciary, who had surrendered the fund in his hands to the supreme authority of the country. In such case it does not matter that such authority is denounced as unlawful and treasonable. The same thing may be said of every mere *de facto* government. It is unlawful, because it is simply *de facto*. The right to confiscate the property of enemies during war does not depend upon the lawfulness of the government which enforces it. It is derived from a state of war, and is called the right of war. Accordingly, when things in action are confiscated, peace being made those which are paid are deemed to have perished; but those not paid revive and are restored to their true creditors. *Ware v. Hylton*, 3 Dall. 227; *Vattel*, Book 3, chap. 8, § 138, and chap. 9, § 161.

In *The Prize Cases*, 2 Black. (U. S.) 636, the doctrine that the parties to a civil war are in the same predicament as two nations who engage in a contest, and have recourse to arms, was fully recognized and sustained. It was also there held that the civil war between the United States and the Confederate States attained such character and magnitude as to give to the United States the same rights and powers which they might exercise in the case of a national or foreign war. Among these was the right to blockade southern ports against neutral nations, the right to treat as public enemies all persons residing within the territory controlled by Confederate authorities, and to seize and confiscate their property. These were declared to be belligerent rights resulting from a state of war, applicable alike to civil and to foreign wars. It was upon this principle the United States authorities seized and confiscated the cotton of Mrs. Alexander, a widow lady residing in the State of

Arkansas, who did not even sympathize with the people of the south in the struggle for independence. The supreme court of the United States sustained the act, declaring that the personal dispositions of individuals inhabiting enemy's territory cannot, in questions of capture, be the subject of inquiry. *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 405.

According to the law of nations, the justice of the cause being reputed equal between two enemies, whatever is permitted to one in virtue of a state of war, is also permitted to the other. Vattel, 382. It does not matter how the struggle terminated — who the victor and who the vanquished. The question is not one of right, but of power, appertaining to a state of war — power *flagrante bello*. The government of the United States may exercise both sovereign and belligerent powers. In its sovereign capacity it may punish treason by seizing and confiscating the property of the guilty party. This, however, can only be done by the conviction of the offender according to the forms and requirements of the constitution and laws. His guilt must be made to appear judicially. The constitution throws the shield of its protection around the citizen by declaring that no one shall be deprived of life, liberty or property, except by due process of law. When, however, civil war exists, and the government asserts the rights of a belligerent, such as appertain to a state of war between independent nations; treating all the inhabitants of the opposing section as public enemies; blockading their ports against neutral powers; seizing and confiscating their property without trial and without conviction; it must be content to accept all the results which flow from the position thus assumed. In the Prize Cases, it is admitted by Mr. Justice GRIER that the parties in a civil war usually concede to each other belligerent rights. In the same cases, Mr. Justice NELSON delivering a dissenting opinion, in which Judges TANEY, CATRON and CLIFFORD concurred, said: "In the case of a rebellion or resistance of the people of a country against the established government, there is no doubt, if, in its progress and enlargement, the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties, as in the case of a public war. And in defining the legal consequences resulting from a public war, he declares, "All the property of the people of the two countries on land or sea

Newton v. Bushong.

are subject to capture and confiscation by the adverse party as enemy's property; with certain qualifications as respects property in land."

In Wheaton the same doctrine is thus announced: "But the general usage of nations requires such a war (civil) as entitling both the contending parties to all the rights of war as *against each other*, and even as respects neutral nations. Wheat. Int. Law, 296; *The Tropic Wind*, L. R., July, 1861; *Hughes v. Letsey et al.*, 5 id. 148; *Price v. Poynter*, 1 Bush. (Ky.) 387; *Coolidge v. Guthrie*, U. S. circuit court for southern district of Ohio, vol. 8 Am. Law Reg. 22.

It has been urged here and elsewhere that the government of the United States might at the same time exercise both belligerent rights and sovereign rights — belligerent with regard to the opposing section, and sovereign in punishing individuals engaged in resisting its authority. It might be demonstrated, I think, that inasmuch as the war was carried on by sovereign States, associated in a common confederacy, exercising the highest attribute of government, that no citizen, taking up arms under the authority of that government, and yielding obedience to its laws and mandates, can be held amenable to the penalties of treason. It is, however, unnecessary for the purposes of this case to establish that proposition. Let it be conceded that the government, having reduced the people of the South to submission, has the right to treat them as rebels and traitors. The same may be said of every established government; and the argument, carried to its legitimate results, proves that in a civil war belligerent rights can only be exercised by the successful party.

It may be that the laws of the Confederate government can no longer be enforced, and that no person can claim exemption from punishment for treason under that authority; but what is to be said in respect to contracts made, rights vested, payments made, liabilities incurred, duties and obligations enforced, whilst such laws were in operation. The government of the United States was unable to afford any protection to this executor at the time of this transaction. Its courts were not only closed against him, but he was declared an enemy of the United States; and his property liable to capture and confiscation by the authorities of that government. Whatever security he had against violence and wrong — whatever protection for person and property, was derived from the

Newton v. Bushong.

Confederate government. Protection and allegiance are correlative obligations. As the citizen is justified in obeying the laws which protect him, so his rights and liabilities in civil and local matters must be tested and settled by the rules of the government which has dominion over him.

The government of the United States obtained many important advantages by the exercise of belligerent rights during the war. It seized and confiscated millions dollars' worth of property belonging to southern citizens who had taken no part in the struggle. It was relieved from all responsibility for acts done on southern soil and on the ocean by the armies and navies of the Confederate States. Its blockade of southern ports was respected; and its right to exert against neutral commerce all the privileges of a party to a maritime war, fully recognized. The people of the northern States approved this policy of their government, and reaped all the advantages flowing from it. For the losses they thereby sustained they must for redress look to the government which claimed their allegiance and received their services. Considerations of natural justice and equity, the laws and usages of nations, require that the people of the South shall not be placed in the position of insurers of funds in their hands lost by the accidents of war.

In considering this case I have been content to concede that the government of the Confederate States was only a government *de facto*. Whether it was not, during its existence, something more, is a proposition in regard to which statesmen and jurists will differ so long as a trace of the struggle remains; so long as the fundamental principles of the government excite discussion among men. The decision of that question is not rendered necessary in any aspect of this case. Should it ever arise I trust this court will meet it with the gravity and deliberation its importance demands.

The other judges concurred.

Decree reversed.

Lee v. Murphy.

LEE V. MURPHY.

(25 Gratt. 733.)

Pardoning power.

The governor of Virginia commuted defendant's sentence for a felony (three years in the penitentiary), to one year in jail, with the consent of the prisoner. *Held*, (1) that the governor had the constitutional authority to do such an act; (2) that the act was a conditional pardon and not a commutation, as it substituted a different punishment; (3) that the prisoner could be lawfully held to the performance of the condition.

HABEAS CORPUS. Lawrence Murphy was convicted of a felony, in April, 1872, in the hustings court of Richmond, and sentenced to three years' imprisonment in the penitentiary. In May following the governor interfered in his favor by the issue of the following warrant :

"VIRGINIA — to wit: It appearing to the executive that Lawrence Murphy now confined in the city jail of Richmond, awaiting removal to the penitentiary, under sentence of the hustings court of said city, for unlawful shooting, is a fit subject for commutation of sentence: therefore I, Gilbert C. Walker, have, in pursuance of the authority vested in the executive by law, thought proper to commute, and do hereby commute the punishment of the said Lawrence Murphy from imprisonment in the penitentiary for the term of three years into imprisonment in the city jail of Richmond for the term of twelve months from the date hereof.

"Given under my hand as governor, and under the lesser seal of the Commonwealth, this 18th day of May, A. D. 1872.

"G. C. WALKER.

"By the governor.

"JAMES McDONALD, *Secretary of the Commonwealth.*"

The prisoner indorsed thereon the following consent :

"I, Lawrence Murphy, hereby accept the within commutation of my sentence as therein expressed with the condition set forth.

"May 18, 1872.

LAWRENCE MURPHY."

June 8, 1872, the prisoner applied for a writ of *habeas corpus* against N. M. Lee, sergeant and jailer of the city of Richmond. The writ issued, and Lee returned in answer that he held the prisoner by virtue of the sentence aforesaid, and the direction of the judge to await the prisoner's application to the governor for pardon. June 14, 1872, the case was heard. The prisoner introduced the warrant of the governor above set out, with its indorsement, and the Commonwealth, the judgment and sentence of the hustings court, and thereupon the court discharged the prisoner from custody. The sergeant applied for a writ of error, which was allowed by one of the judges of this court.

The Attorney-General, for appellant.

Cabell & Meredith, for appellee.

STAPLES, J. The record in this case presents for our consideration two important and interesting questions: First, has the governor of the State the constitutional power to grant conditional pardons? and second, is the paper which emanated from the executive department on the 18th day of May, 1872, and is filed as an exhibit in this cause, to be considered a conditional pardon, or a mere commutation of punishment? It is laid down in Blackstone's Commentaries (vol. 4, p. 401), that a pardon may be conditional—that is, the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition precedent or subsequent, on the performance whereof the validity of the pardon will depend: and this by the common law. All the writers on criminal law concur in this doctrine; and the English books are full of authorities in support of it. 1 Chitty's Crim. Law, 714; 2 Hawkins' P. C., tit. Pardon; 1 Leach's Crim. Law, 223, 393; *In the matter of Parker et al.*, 5 M. & W. 32.

This power has been exercised by the king of England from time immemorial, not as a part of his royal prerogative, but as an incident to the general pardoning power. The king may annex a condition to his bounty, not because he is king and clothed with royal attributes, but because being invested with the general power of pardoning, he has the right to prescribe the terms and limitations under which he will exercise it. To "grant conditional pardons," then, simply implies a contract between the sovereign power and the

Lee v. Murphy.

criminal, that the former will release the criminal upon certain conditions imposed by the sovereign and accepted by the criminal. It is not an inference from the general power of pardon, but appertains to it and is a part of it.

These are the doctrines and maxims of the common law. They were familiar to the jurists and statesmen of Virginia at the time of the adoption of our first constitution. In the language of Chief Justice MARSHALL, "As the power has been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bears a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look to their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. *United States v. Wilson*, 7 Peters (U. S.), 150.

The constitution of 1776 declares that the governor shall, with the advice of the council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the house of delegates, or the law shall otherwise particularly direct. And this power is conferred in language almost identical in all the amended constitutions, except that it can now only be exercised after conviction. The same terms are used substantially in the constitutions of nearly all the States, and in the constitution of the United States. For example, the constitution of Pennsylvania, both of 1790 and 1838, provides that the governor shall have power to remit fines and forfeitures, and grant reprieves and pardons. Under this provision it was unanimously decided by the supreme court of that State, that "the governor may annex to a pardon any condition, whether precedent or subsequent, not forbidden by law; and it lies on the grantee to perform it; and if the condition is not performed, the original sentence remains in full force, and may be carried into effect."

The supreme court of Massachusetts, in construing a similar clause in the constitution of that State, used this language: "The power of pardoning offenses is conferred on the executive by the eighth article of the second chapter of the constitution. It is general and extends to all cases, except convictions by the Senate on impeachment. This exception proves the comprehensive nature of the power. The only limitation to its exercise is that pardon shall not be granted before conviction. The general power necessarily contains in it the lesser power of remission and commutation. If

the whole offense may be pardoned, *a fortiori*, a part of the punishment may be remitted, or the sentence commuted. If an absolute pardon may be granted, of course a conditional one may be." *Perkins v. Stevens*, 24 Pick. 278.

In *The People v. Potter*, 1 Parker's Crim. Rep. 47, 53, Judge EDMONDS of the supreme court of New York, in commenting upon the words "shall have power to grant reprieves and pardons," declares: "The decisions of the courts in our State, in several of the States of the Union, in the courts of the United States, and in the courts of the British empire, have all regarded these words as conveying the right to attach conditions to the grant of a pardon." The courts of South Carolina, of Arkansas, New Jersey and Maryland, have construed like clauses in the constitutions of those States in the same way. If there are any contrary decisions, they have escaped my attention. It is true, that under the constitution and laws of several of these States, express power is given to the executive to grant pardons upon such terms as he may think proper; but the courts there hold that the power in question is conferred by the general words, and exists independently of these enactments. Mr. Wirt, while attorney-general of the United States, expressed the opinion, that the power of pardoning absolutely includes the power of pardoning conditionally; on the principle that the greater power includes the less. Opinions of attorney-general, 250.

These doctrines have received the unqualified assent of the most approved writers on criminal law in the United States. The rule is thus expressed in Bishop on Crim. Law, vol. 1, § 760: A pardon may be full or partial, absolute or conditional. In some of the States this is so by the express words of the constitution; and where the words are not express, the same result flows from the doctrine that with us a power general in its terms takes the construction given it in the English common law, whence our law is derived.

This citation of authorities would be incomplete without some notice of the case of *Ex parte Wm. Wells*, 18 How. (U. S.) 307; a well-considered decision of the supreme court of the United States. In that case Wells was convicted of murder in the first degree, and was sentenced to be hanged. A pardon was granted him by President Fillmore, upon condition that he be imprisoned during his natural life, which was accepted by the prisoner. He, however, applied for a writ of *habeas corpus*, on the ground that the pardon was absolute, and the condition void. The supreme court was of opinion, that

Lee v. Murphy.

the language used in the constitution, as to the power of pardoning, must be construed by the exercise of that power in England prior to the revolution, and in the States prior to the adoption of the constitution; that the power of the president to pardon conditionally is not one of inference, but is conferred in terms; the language being "to grant reprieves and pardons," which includes conditional as well as absolute pardons.

It must be borne in mind that under the Federal system there are no common-law offenses; the courts have no common-law jurisdiction, and the president can only exercise such powers as are specifically granted in the constitution. Whereas in this State the common law has been adopted, and made the rule of action, unless *plainly repugnant* to the constitution and statutes of the State. The reasons with us for adhering to the common-law doctrines in regard to granting conditional pardons are much stronger, therefore, than any applying to the Federal courts. The practice of granting such pardons, it will thus be seen, is fully recognized in England; is fully sustained by the most approved writers in this country; by the decisions of both Federal and State courts. The identity of the words used in nearly all the constitutions, the uniformity of construction given to those words by all the courts which have had the subject under consideration, lead irresistibly to the conclusion that the framers of our constitution employed the same terms in the sense thus explicitly and plainly established.

The counsel for the prisoner tells us, however, that whatever may be the rule elsewhere, the case of *Commonwealth v. Fowler*, 4 Call, 35, has established a different doctrine in Virginia. A slight examination of the case will show that this is a mistake. Fowler was convicted of felony in the general court, and was pardoned by the executive on the express condition that he (Fowler) shall forthwith submit himself to such authority as the executive shall put over him, for the purpose of confining him to labor bodily in such manner and on such works as a majority of the directors of public buildings shall direct; and he shall continue to work thereon as a common laborer for the space of three years, and shall not be absent therefrom at any time without due license first obtained. This court decided this condition to be illegal. No reasons are given, and we are therefore left to conjecture the grounds of the decision. It will be noted, however, the court do not say that the governor is not authorized to grant conditional pardons, but that "the condition

annexed to this pardon is illegal." And so it might well be held. The effect of the condition was to make the prisoner practically a slave for three years. The authority to be put over him might at any time be changed at the caprice of the governor, and the labor he was required to perform might be varied or increased at the pleasure of persons controlled by no law or authority. It is obvious that the punishment was unknown to our system of jurisprudence, and might have been perverted to purposes of the grossest injustice and tyranny. No court could hesitate to pronounce such a condition illegal, and this was all the court intended to say. The case is no authority upon the present question, and would never have been relied on as such but for the mistake of the reporter in his statement of the points decided.

The counsel for the prisoner, in the course of his argument, cited a section reported by the revisors of 1847 and 1848, and recommended for adoption by the legislature. It provides that the governor, upon the petition of the person sentenced, may grant him a pardon upon such conditions, under such limitations and with such restrictions as may be deemed proper by the governor and assented to by the petitioner. The counsel relies upon this recommendation of the revisors and the refusal of the legislature to adopt it, to show that according to the prevailing opinion the executive did not possess the power to grant conditional pardons; and it was inexpedient in the opinion of the legislature to invest him with it. The revisors, however, do not assert that the executive does not possess the power in question. They merely say the regularity of a conditional pardon has been doubted in Virginia, and the section proposed will remove that doubt. The legislature may have declined to adopt the provision from a conviction that the constitution conferred upon the executive full power over the whole subject, and legislation was thought not only unnecessary, but improper. But whatever may have been the reasons controlling the legislature, it is clear that neither its collective will nor the opinions of the individual members can, in any wise, impair or restrain the exercise of powers vested by the constitution in the executive department. It may be that the practice in Virginia has not been in conformity with the views here expressed. The question, however, is not one of practice, but purely of constitutional interpretation. The language of the constitution is, the governor "shall have power to grant reprieves and pardons." What kind of pardons? Unconditional,

Lee v. Murphy.

it is said. But why unconditional? The constitution makes no such restriction. There are various kinds of pardons: full, absolute or unconditional, partial and conditional. One of these is as fully embraced in the words of the grant as the other; all are contained in it. Can we conceive of a case in which the greater power does not include the less? To use the words of Mr. Justice CAMPBELL, of the supreme court of the United States: "The real language of the constitution is general; that is, common to the class of pardons, or extending the power to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them."

These considerations, it seems to me, justify us in holding that the power to grant conditional pardons is vested in the executive of Virginia. In respect to the policy of so vesting it, there cannot be a question. The power of granting conditional pardons must reside somewhere; and by common consent of all the States it is vested in the executive department. It has been well said that the authority to suspend the operation of laws is a privilege of too high a nature to be committed to many hands, or to those of any inferior officer in the State. If the chief magistrate can be trusted with the power of absolute and unconditional pardon, he is certainly a safe depository of the qualified power. Cases are constantly arising which call for the exercise of executive clemency in a modified form, by reason of circumstances subsequently occurring, or which could not have been taken into consideration by the courts and juries. Even the public good, which is the ultimate end of all punishment, sometimes requires that some milder form of punishment should be substituted for that which was enforced by the sentence of the law.

The objection sometimes urged, that no man can contract for his own imprisonment, is answered by the consideration that the convict, having already forfeited his life or his liberty, surrenders nothing by his contract with the executive. The substituted sentence is his own voluntary choice; and the courts merely execute that choice in the infliction of a milder punishment. A performance of the condition renders the pardon absolute; and entitles the felon to his discharge from all the penalties consequent upon the conviction. On the other hand, his failure to perform renders the pardon utterly void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced. Bacon's Abridg., Pardon, E.

It is to be borne in mind there is a material distinction between a conditional pardon and a mere commutation of punishment. A conditional pardon is a grant, to the validity of which acceptance is essential. It may be rejected by the convict; and if rejected, there is no power to force it upon him. A commutation is the substitution of a less for a greater punishment, by authority of law, and may be imposed upon the convict without his acceptance, and against his consent. In this State the executive is only authorized to commute capital punishment; whereas he may grant conditional pardons in all cases legally involving an exercise of the pardoning power.

It remains now to inquire whether the warrant of the executive in this case is to be regarded as an attempted commutation of punishment, or as a conditional pardon. After reciting that Lawrence Murphy is a fit subject for commutation of sentence, the warrant declares that the punishment of the prisoner is hereby commuted from imprisonment in the penitentiary for the term of three years into imprisonment in the city jail of Richmond for the term of twelve months from the date thereof. And at the conclusion is the indorsement of the prisoner, "accepting the commutation with the condition set forth," and bearing the same date with the warrant.

Now, it is true that this paper does not purport to be a pardon of any sort, but a mere commutation of punishment. But the question recurs, whether the acceptance by the convict of the terms imposed by the executive does not give to the warrant the operation and effect of a conditional pardon. Clearly the original punishment is remitted, and a milder sentence is substituted. It is true this could not be done without the consent of the convict. It is equally clear that with his consent it might be done. Commutation is simply the substitution of a less for a greater penalty or punishment. If followed by the acceptance of the convict, it practically amounts to the same thing as a conditional pardon. I do not mean to assert it has the same effect of a full pardon, which, when performed, not only remits the original punishment, but restores the competency of the offender and removes the infamy of the conviction. Certain it is, it has the operation and effect of a partial pardon, which is described in many of the cases as merely remitting or releasing the punishment without removing the guilt of the offender. *Perkins v. Stevens*, 24 Pick. 277; *Ex parte Garland*, 4 Wall. (U. S.) 333, 380.

Lee v. Murphy.

It has been argued, however, that this warrant cannot be considered a conditional pardon, because neither the word "pardon" nor any equivalent phrase is used therein. It is well settled that no technical words or terms are necessary to constitute a pardon. In some of the ancient pardons a variety of language is to be found, such as acquit, pardon, release and exonerate. In Pennsylvania the practice is "to remit the sentence," and this is equivalent to a pardon of the offense. *Hoffman v. Coster*, 2 Whart. 453. In Massachusetts similar words are construed a pardon of the punishment, but not as a removal of the disabilities consequent upon a conviction. And in South Carolina an instrument signed by President Monroe, ordering "that the prisoner be forthwith released from prison," was decided to be a full pardon, upon the ground that it accomplished all the benefit to the prisoner that is practicable, and seemed to be entitled to every liberality of construction that may not contravene any well-settled adjudications. *Jones v. Harris*, 1 Strobb. 160.

A case somewhat similar to the present is found in 14 Mass. 472. The opinion of the supreme court of that State being asked upon the right of the legislature to commute the punishment fixed by law, after sentence has been given. The judges unanimously certified that the legislature had no such power, but that the power of pardoning offenses was solely in the governor, by and with the advice of the council; to *which power the right of commuting punishment*—if by such right be meant a right of pardoning upon condition of the convict's *voluntarily submitting to a lesser punishment*—must be a necessary incident. A note to this case by Chief Justice CUSHING shows he fully recognized the distinction between a commutation authoritatively imposed, which was unknown to the Massachusetts constitution, and a commutation voluntarily accepted by a felon, which might be regarded as a necessary incident to the pardoning power.

The object of the courts in construing instruments of this character is to carry out the intention of the parties; and wherever that is doubtful, the grant is interpreted most beneficially for the citizen or subject, and most strongly against the king. This is an universal rule in the interpretation of pardons. 1 Bishop's Crim. Law, § 757, and cases cited.

It is said, however, that the executive did not intend in this case to grant a pardon of any kind, absolute or conditional. He certainly intended to remit the punishment imposed by the law, and

to substitute another in its place. He certainly did not intend to do so without the consent of the convict, unless we are prepared to hold that he was either ignorant of his constitutional functions, or that it was his purpose to transcend them. We must presume it was his intention to exercise just such powers as are vested in him by the constitution; and we should give his official acts a fair and liberal interpretation, so as to make them valid if possible. In cases involving merely pecuniary rights and obligations, the courts are even apt to give effect to the contracts of parties. Thus a deed which cannot operate in the precise way in which it is intended to take effect, shall yet be construed in another, if in this other it can be made effectual. For example, a deed intended for a release, which cannot operate as such, may still take effect as a grant of the reversion, as a surrender or an attornment, or even as a covenant to stand seized. 2 Pars. on Cont. 504, and cases cited.

It is also held, if the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail, for the reason, says the common law, that it will be more for the benefit of the subject and the honor of the king, which is more to be regarded than his profit. 10 Coke, 67 f.; 2 Pars. on Cont. 506, note n.

And the same rule should be held to apply to the grants of a State. It applies with peculiar force whenever the life or liberty of the citizen is involved. The anxiety of the courts in all such cases to effectuate rather than defeat the intention of the State, expressed through its chief magistrate, must be regarded as eminently wise, just and beneficial.

In the present case, should the convict be remanded to the penitentiary under the original sentence, the executive, if he adheres to his original purpose, will accomplish the object aimed at by a slight change in the phraseology of the warrant; but the intent will then be no more manifest than now, nor would the practical operation of the warrant be varied by this change. Indeed, the same result will be accomplished by a single reprieve of the convict for one year and a pardon at the expiration of that period.

Upon the whole, it seems to me, we are well justified in construing this warrant as a conditional pardon, if not of the offense, certainly of the punishment imposed by the law. The convict has the right to perform the condition by enduring the substituted punishment prescribed by the executive; and upon serving out the full

Lee v. Murphy.

term of twelve months in the city jail of Richmond, he will be entitled to his discharge from any further punishment. The period of his release on bail is, however, not to be included in estimating or computing his term of confinement in the jail. The judgment of the circuit court of the city of Richmond must, therefore, be reversed, and the case remanded to be proceeded in in accordance with the views herein expressed. If the said Lawrence Murphy shall appear before said court in answer to his recognizance, he will be remanded to the city jail, to undergo the punishment prescribed in the warrant of the executive.

In the course of this opinion, nothing has been said in respect to the kind and nature of the conditions the executive may annex to his pardon. Nor is it intended to express any opinion upon that point, except to say they must not be impossible, immoral or illegal. It is clear that he is authorized to substitute, with the consent of the prisoner, any punishment recognized by statute or the common law as enforced in this State. In this case there can be no question as to the legality of the condition.

Since the foregoing opinion was prepared, I have seen the case of *Ball v. Commonwealth*, 8 Leigh, 726. I have only to say the opinion expressed by Judge FRY and concurred in by the other judges, is a mere *obiter dictum*, was not called for by any thing in the case, and is, therefore, no authority for this court. Besides, Judge FRY does not assert that conditional pardons are unconstitutional. He is very *careful not to say so*. He merely says that in this State pardons are absolute constitutionally or *from practice*. And in point of fact this latter is entirely correct. But as I have already attempted to show, it is not a question of practice, but purely of the interpretation of plain and constitutional provision.

CHRISTIAN, J., was absent.

BOULDIN, J., delivered a dissenting opinion.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

BURTS v. LOYD.

(45 Ga. 104.)

Removal of cause to Federal court.

An administrator filed a bill to marshal assets against creditors, some of whom had commenced suits at law. An injunction was allowed, conditioned to allow the claims to be litigated to ascertain the amounts due, the priority of the claims, and the right to payment out of the funds. One of the creditors resided in another State and made application to have his action at law removed to the United States court. *Held*, that the cause was not subject to removal, as it was merely collateral to the suit in equity.

WRIT OF ERROR on appeal from an order of JOHNSON, J., Chatahoochee county, removing cause into the United States court. The order is assigned as error. The facts sufficiently appear in the opinion.

Peabody & Brannon, E. H. Worrell, E. G. Raiford, for plaintiff in error.

Blanford & Thornton, for defendant.

MONTGOMERY, J. The administrator, being sued by Loyd and other creditors, filed a bill to marshal assets, alleged insolvency of

Barts v. Loyd

the estate, and prayed that the common-law suits be enjoined. The claims of the creditors were conflicting, and the amounts of the claims disputed by the administrator.

The chancellor granted a modified injunction, permitting the creditors to go on at common law and obtain their judgments for whatever amounts might be found to be due, but decreeing that the judgments should not bind the administrator personally, or be enforced until the final decree. Upon the passing of this interlocutory order, Loyd filed his petition under what are known as the Garsed acts of Congress, of 1866 and 1867, for the removal of his common-law suit to the circuit court of the United States, Loyd being a non-resident, by admission, although that fact does not appear from the record. The court granted the order to remove, and the administrator excepted. We think the court erred. The common-law suit, with several others, had become merged into the bill. A removal of any one of the suits dissolved the injunction, *ipso facto*, as to that suit. *McLeod v. Duncan*, 5 McLeod, 342; *Bowen v. Kendall*, 23 Law Reports, 538. The administrator might have again enjoined in the United States court, but how could that court determine the *pro rata* to which Loyd might be entitled out of the assets in the hands of the administrator? "A final determination of the controversy, so far as it concerns him," cannot be made in that court "without the presence of the other defendants as parties in the cause," made by the bill. And the administrator cannot carry them there in any new bill he may find it necessary to file in that court. Congress certainly could not have intended to so incumber the administration of estates, in all the States, as would be the result of permitting every non-resident creditor of an insolvent estate to have his part of the case made by the administrator's filing a bill to marshal assets removed to the United States courts. The present case is much stronger against the removal than *Peters v. Peters*, 41 Ga, 242.

The judgment of the court is reversed.

FORSYTH V. THE MAYOR, ETC., OF ATLANTA.

(45 Ga. 122.)

Municipal corporation — fire limits.

Plaintiff declared against the corporation of Atlanta, alleging that it had by ordinance defined fire limits in the city within which the erection of wooden buildings were prohibited. That while the ordinance was in force the city council authorized F. to erect a wooden building in the said limits which taking fire caused the destruction of plaintiff's building. *Held*, on demurrer, that the action could not be maintained.

DEMURRER to a declaration by W. G. Forsyth against The Mayor and Council of Atlanta, which stated that plaintiff owned certain wooden buildings within the fire limits of Atlanta, an incorporated city, and that its municipal officers were bound to protect them against fire; that the city had an ordinance against the erection of any but fire-proof buildings within said limits, and forbidding blacksmith shops within a specified distance of other houses; that while said ordinance was in force they permitted and authorized one Finney to build a wooden house and keep a blacksmith shop within said limits and nearer to plaintiff's houses than the ordinance specified; that Finney's building taking fire communicated the same to plaintiff's, whereby they and their contents were destroyed. The relief prayed for was that defendant be adjudged to pay the loss. The defendant demurred and the court sustained the demurrer.

J. T. Glenn, for plaintiff in error.

W. T. Newman, for defendant.

MCCAY, J. Were this a case when, after an ordinance of the city was adopted and published, one had built in accordance therewith, and on the faith that no wooden buildings would be permitted to be put up within the fire limits, and after thus acting and thus building, the city should permit a wooden building to be erected, by the building of which, plaintiff's house was burned, the argument made in the hearing might have some force. But, as the

Georgia Railroad and Banking Co. v. McCurdy.

case is put in the declaration, the plaintiff's own house was a wooden one, and must have been built either before the ordinance was passed, or in violation of it, or by the same permission as is complained of. In either case the plaintiff has come to no harm from the city. He did not build on the faith of the ordinance. If a dangerous structure was put up near his he had his remedy against the builder of it, by injunction. The permission of the city did not and could not justify any private person to erect a nuisance; its permission is a mere waiver of its rights. Persons damaged had their remedy, either preventive by injunction or remedial by abatement.

Judgment affirmed.

GEORGIA RAILROAD AND BANKING CO. v. MCCURDY, plaintiff
in error.

(45 Ga. 288.)

Common carrier — contributory negligence.

Plaintiff paid his fare on defendant's road to N. where the conductor agreed to let him off. The train did not stop at N. but only slackened speed. The plaintiff was afraid to get off. After the station was passed the conductor again slackened speed and directed the plaintiff to get off. He did so and was injured. *Held*, that these facts did not constitute negligence on the part of the plaintiff, and that the verdict of the jury awarding damages to plaintiff must be sustained.

ACTION by John W. McCurdy against the Georgia Railroad and Banking Company for injuries. Plaintiff paid his fare to News Station on defendant's road. This was a station for wood and water only, but the conductor agreed to put him off there. On arrival at N. the train did not stop but only slackened speed, and plaintiff was afraid to get off. He sought the conductor who blamed him angrily for not getting off and again slackened speed for him to get off. He did so and sustained the injury to his ankle for which this action is brought. The jury gave plaintiff \$500.

Hill & Candler, Hillyer & Bro., for plaintiff in error.

L. J. Winn, for defendant in error.

VOL. XII. — 72

MCCOY, J. 1. The evidence is very plain that the railroad company, through its agent, the conductor, undertook to carry John W. McCurdy from Atlanta to the station referred to. This, as we think, bound them so to do. It makes no difference whether they were in the habit of doing this or not. By taking his fare to that point, they undertook to carry him there and put him off. But on this point the evidence is rather in favor of the idea that it was the usual practice of the road to take passengers for that point. Why announce in the published rates the price from Atlanta to that point? But, as we have said, the company undertook to carry him to that point, and to let him off there; surely the conductor is an agent authorized to make such a contract, as it is directly in the line of his business. If he were to take a fare for four miles, he would be bound to put his passenger off there, unless there was an agreement not to do so. It seems to us this settles the question; for it will not, for a moment, be contended that if they undertook to carry the passenger to a particular point and put him off, they could fulfill this undertaking by slackening the speed at that point so that the passenger might—running the risk of his life—jump off from the moving train. But they did not even do this; they passed on until notified, when the conductor ordered the train to be again slackened.

Who that has seen much railroad travel can fail to see in his mind the picture of this scene? The conductor in a pet, his train bound to take up its speed at an unusual point; the passenger conscious that he was giving unusual trouble, the train slacks its speed; he stands ready, the conductor ready also, to give the word—now jump. None but a timid, and yet resolute man would fail, and jump he did. We are clear this was not complying with the contract. Nor can this road defend itself on the idea that it acted so badly, that with ordinary prudence the man ought to have seen it was dangerous to jump. The railroad was bound to put him off; to stop its train for this purpose. This it failed to do. and it was not want of ordinary care in the passenger to use the only means to get off the course of the defendant permitted.

2. We think the verdict of the jury *sustained* by the evidence as to the amount of the damages.

Judgment affirmed.

HOLLINGSWORTH V. THE GERMANIA INSURANCE COMPANY.

(45 Ga. 294.)

Insurance — cancellation of policy.

Defendants, in their policy, reserved the right to cancel them "on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term." Before a loss occurred the policy was returned for cancellation to the company's agent who notified plaintiff's agent that he was ready to pay the unearned premium, but he did not in fact pay it until a month subsequent; in the meantime the loss occurred. *Held*, that these facts did not relieve the company of their liability, and that plaintiffs could recover.

ACTION on a policy of fire insurance issued by the Germania, Niagara, Hanover and Republic companies to Hollingsworth & Moraque, tried before Judge PARROTT and a jury at July term, 1871, Floyd Superior Court. The court charged the jury that the notification by the insurer's agent to the assured's agent that he was ready to pay back the unearned premium canceled the policy without actual payment. The jury found for the defendants. The facts sufficiently appear in the opinion.

Printup & Fouche and Underwood & Rowell, for plaintiffs.

Smith & Branham, for defendant.

MONTGOMERY, J. The policy sued on in this case contained the following provision: "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be at any time terminated at the option of the companies, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

The insurance was effected in Rome, Georgia, on goods in Gadsden, Alabama. The companies elected to cancel the policy unless the assured would pay an additional premium, which they declined to do. The companies' agent notified the assured to forward their policy to Rome, for cancellation, and he would refund the unearned premium.

Hollingsworth v. The Germania Insurance Co.

The policy was forwarded from Gadsden, on January 15, 1868, and received by the agent on the 17th or 18th of the same month, with instructions to pay the unearned premium to the plaintiffs' agents in Rome. He notified the plaintiffs' agents that he was ready to pay them, but did not in fact pay them until February 27, more than a month after the receipt of the policy by him. The goods were burned on the night of February 25. On the morning of the 28th of February, before it was known in Rome that the loss had occurred, the agent of the companies met one of the plaintiffs in Rome, and notified him of the payment of his agents, with which he expressed himself satisfied. A few hours afterward the news of the loss reached Rome, and the plaintiffs refused to receive the money from their agents, and brought the present suit.

1. Do the facts exonerate the companies? We think not. Their contract was that they might cancel "on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." They gave the notice, but they did not refund until the loss had occurred. On the contrary, they failed to comply with the conditions of their contract for more than a month after the plaintiffs had done all that was required of them. It is not pretended that they tendered the money, and that plaintiffs' agents refused to receive it. *The Peoria Marine & Fire Ins. Co. v. Botts*, 47 Ill. 516; *Hawthorn v. Germania Ins. Co.*, 55 Barb., cited in vol. 9 Am. L. R., p. 385.

But it is insisted, for the companies, that the policy expired when it was surrendered for cancellation; and the case of *Sullivan v. Massachusetts Mutual Fire Ins. Co.*, 2 Mass. 318, is relied on as sustaining this view. There the property was alienated some time before the surrender; and the liability of the company as insurer ceased on alienation. Their charter bound them to refund unearned premiums, on surrender of the policy; which they refused to do, because it had not been surrendered within one year from the termination of their liability as insurers by the alienation, in which time, they insisted, the charter required the surrender to be made. The court, however, held that the surrender was in time to make them liable. There was no question as to when their liability as insurers ceased; that had ceased long before the surrender of the policy, by the alienation, though they were still bound by the terms of their charter to pay on the policy whatever of unearned premium they held, or, rather, whatever proportion of the funds the assured

Hollingsworth v. The Germania Insurance Co.

was entitled to, at the time of the surrender, the company being organized on the mutual plan, and each insurer being a stockholder, entitled, "at the expiration of his policy," to demand and receive from the corporation his share of the remaining funds, in proportion to the sum or sums actually paid by him. Again, it is said, Code, section 2686, controls the case. Hardly. Plaintiffs, by letter, agreed to the proposal of the companies to cancel, upon the companies complying with the objections imposed upon them by the contract, should they elect to cancel. They failed to do this; hence, no cancellation. Defendants also rely on *Taylor v. The Merchants' Fire Insurance Company of Baltimore*, 9 How. (Sup. Ct.) 398. That case only goes to the extent that an offer made by mail and accepted cannot be revoked. So here, had the agent of the companies, before the loss occurred, paid the unearned premium to the agents of plaintiffs as the policy of insurance required him to do, if he wished to cancel, the plaintiffs could not have insisted on retaining the policy in force. The case in 9 Howard, however, refers to and approves *Eliason v. Henshaw*, 4 Wheat. 228, in which the court say: "An offer of a bargain by one person to another imposes no obligation upon the former, unless it is accepted by the latter, according to the terms on which the offer was made. Any qualification of or departure from those terms invalidates the offer, unless the same be agreed to by the party who made it." The terms here were that the companies should pay the unearned premium to plaintiffs' agent. These terms they departed from; hence, the offer was invalidated.

It is also argued with some ingenuity that, inasmuch as the law is, in cases of insurance, "if the loss has already occurred, and both parties are ignorant of it, the contract is valid" (Code, § 2758), therefore, the converse of the proposition must be true; and if a rescission of the contract is made in ignorance of the loss, it is equally as binding. The reply is, that insurance is often effected because loss has already probably occurred, though both parties are ignorant of it. This is not uncommon, in cases of vessels at sea; and the risk of a loss which may have already happened is provided for by the amount of premium charged, reaching sometimes as high as fifty or even seventy-five per cent of the full value of the property insured. In case of cancellation, the manifest intention of the parties is to discharge the insurer from all *future* liability, and not to relieve him from any liability incurred under the con

Cook v. Pridgen.

tract. To illustrate: suppose the goods in this case had been partially destroyed before cancellation of the policy, the cancellation would not relieve the companies from liability for that loss; but, for a total destruction afterward, they would not be liable.

Judgment reversed.

COOK V. PRIDGEN.

(45 Ga. 331.)

Basement — Parol license — Statute of frauds — Action.

Plaintiff's ancestor gave to persons through whom defendants derive title a license by parol, to back water upon his land by damming a stream for a mill power. Under this license the defendants and their predecessors built the dam and a mill by the dam site, at an expense of \$15,000, for the purpose of enjoying the easement. Plaintiff brought suit at law for the trespass. *Held*, (1) that the easement was permanent in its nature, and the license should have been in writing, under the statute of frauds; (2) that investments of magnitude having been made by defendants and their predecessors, under such license they were in equity entitled to a grant as of specific performance; (3) that such an equitable defense might be sustained to defeat the plaintiff's action at law.

TRESPASS by James C. Cook against Pridgen, Stapler & Dunn for causing the water of the Chattahoochee river to back over his land by maintaining a dam below. From 1838 to 1864, the time of his death, James Cook, plaintiff's father, owned the land of plaintiff, and one Jones owned, during the same time, the land of defendants which was sold to defendants by the administrator of Jones' estate. In May, 1838, Jones began the erection of a dam across the stream at his land, intending to have it five feet high. Plaintiff's father was present frequently during the building, and asked Jones' agent how much back-water there would be, and was informed that the rise would, with a five-foot dam, be one foot above the natural level at Cook's land; and two feet of the dam was six feet high, as Jones desired it. Cook consented that the dam be made six feet high, which was accordingly done. Under this consent the dam was completed, at a cost of \$5,000; and the mill beside it, with machinery therein, at an expense of \$10,000.

Cook v. Pridgen.

Jones kept up the mill and dam while he lived, and his administrator continued it until 1865, when the mill was destroyed by the troops of the United States. Defendants then bought the dam, which remained the same, and rebuilt the mill at a cost of \$10,000. The overflow had continued uninterruptedly from 1838 to the commencement of the suit; but the dam had twice been partially washed away and rebuilt. Plaintiff gave evidence that the dam was broken when defendants bought; that the overflow on his land on account of it, was five feet instead of two, and that he had notified them, when they commenced repairing, that he would sue them for damages and the amount of the damages. The fact of plaintiff's complaints at the repairing, rebuilding, etc., was contradicted by defendants. There were a number of exceptions to the charge of the court, but these are not reviewed in the opinion which renders the decision on other points. The jury gave defendants a verdict.

Moses & Downing and Peabody & Brannon, for plaintiff, citing 24 Ga. 182; 14 id. 1; 24 id. 181; 8 A. & E. 777; 5 B. & C. 227; 2 Am. L. C. 531; 1 D. & B. (N. C.) 492; 21 Ga. 457; 7 id. 388.

H. L. Benning, for defendants.

MCCAY, J. 1. We think the authorities, taken altogether, establish this proposition, that a *permanent* easement on the land of another is an interest in the land; and a parol license to enjoy such an easement is void under the statute of frauds. 4 East, 109; *Hurlins v. Shipman*, 5 B. & C. 221. See, also, 8 B. & C. 298; 4 Ad. & Ell. 329.

There is, without question, some confusion in the authorities; but we think the true distinction, which will reconcile most of them, is between a permanent right, one in its nature such that the parties must have contemplated its continuance, and a mere permission to do something on land, which, from the nature of the thing, is temporary only. 2 Hill. Abr., Am. L. Real Prop. 52; Ang. on Watercourses, 286. Without doubt, there are cases inconsistent with this view. But it will, we think, be found that, generally, these cases may be explained consistently with the distinction we have alluded to, by considering the forum, whether at law or in equity, in which they have occurred.

A license even in writing is revokable; that is, if it show that it was the intent of the parties to give a mere license, and not a grant.

In other words, a mere license is, in its nature, revocable ; since that is the intent of the parties. If it be intended to be irrevocable, it is ordinarily a grant and must be in writing, or it is void *at law* by the statute of frauds.

But it does not always follow that a license is revocable at the will of the party giving the license. Even a temporary license must be considered as intended to continue until the objects of the parties are attained, as where even in courts of law it has been held that a *mere license* to overflow land with water, by a dam for a saw-mill, cannot be revoked during the continuance of the dam ; since it may fairly be presumed that the parties intended the license to last that long at least. But if the dam be destroyed, then, as the term of the license is out, it may be revoked, and this when the easement is a *mere license*, so that may be by parol. See Angell on Water-courses, § 293, and note, with authorities cited.

2. But, while at law an easement, in its nature permanent must, as it is an interest in land, be in writing, signed by the party owning the land to be burdened, equity will compel the specific performance of a parol contract for such an interest in land on the same principles as it will other parol contracts for the sale of land. 4 S. & R. 241 ; 4 Watts, 317 ; 2 Equity Cases Ab. 523 ; 2 Atkyns, 391 ; 3 Caine's Cases, 87. So that if one under a *grant* of an easement, though it be by parol, go into possession and make valuable improvements in pursuance of the grant, so that it would be a fraud upon the grantee to permit the statute of frauds to operate, equity will decree a title. *Houston v. Lafee*, 46 N. H. 508. Here was a clear grant—the easement was, in its *nature, permanent* ; a mill and dam of the character disclosed by the proof must, in the nature of it (not as a *saw-mill* or other structure necessarily temporary), be intended for a permanent investment, and in our judgment this permission was not a mere license but a grant for motives satisfactory to the grantor. The proof is, that the defendants acted upon the grant, went into possession, expended large amounts of money, and continued in possession for years.

3. Under our law the defendant may set up, at law, any perfect equity—any right that needs nothing but a decree in chancery ; and we think this was just such a case. We do not discuss the other questions made in the record, or pass upon them, as we think the case turns on the view of the law we have taken.

Judgment affirmed.

 Southwestern Railroad Co. v. Southern & Atlantic Telegraph Co.

SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, v. SOUTHERN & ATLANTIC TELEGRAPH CO.

(48 Ga. 43.)

Constitutional law — eminent domain — act authorizing the erection of telegraph on private property — Compensation.

An act of the legislature authorized telegraph companies to construct their lines upon the right of way of the railroad companies of the State, and provided for an arbitration to assess damages therefor in case of disagreement, but made no provision for enforcing the award. *Held*, unconstitutional.

BILL for injunction filed by the plaintiff in error to restrain the defendant in error from erecting their telegraph lines on the right of way of the plaintiff in error. The injunction was refused.

Lyon & Irvin, for plaintiff in error.

A. O. Bacon, for defendant.

WARNER, C. J. This was a bill filed by the Southwestern Railroad Company, and the Western Union Telegraph Company, against the Southern & Atlantic Telegraph Company, praying for an injunction to restrain the latter company from erecting and constructing a line of telegraph on the right of way heretofore granted by the general assembly to the Southwestern Railroad Company. On hearing the application for the injunction, the judge refused to grant it, and the complainants excepted. The defendant is a foreign corporation, created and chartered by the laws of the State of New York, and claims the right to construct, erect and maintain its line of telegraph upon the right of way of the Southwestern Railroad Company, under an act of the general assembly of this State, passed on the 26th of August, 1872. There can be no doubt, we think, that it was competent for the general assembly, in the exercise of its sovereign authority, to grant to this foreign corporation the privilege and right to erect, construct and maintain its line of telegraph upon the public domain of this State, if, in its judgment, the public interest required it, with this

Southwestern Railroad Co. v. Southern & Atlantic Telegraph Co.

limitation, however, that it could not authorize this foreign corporation or any other corporation, to take private property for that purpose, without providing that just compensation should be made to the owners of the private property so taken and appropriated, in the erection and construction of its telegraph line; and the main controlling question in this case is, whether such provision has been made by the act under which the defendant claims. The third section of the act declares, "that in the event that any railroad company should deem that they had sustained damage by reason of the location of a telegraph line over their right of way, the damage, if any, shall be assessed and paid as follows: The railroad company shall select one commissioner, and the person or telegraph company constructing such telegraph line shall select another, and these two shall select a third, and the three persons thus selected shall assess the damage, if any, and the amount so awarded by them shall be paid by the person or telegraph company constructing said line, to the railroad company."

It is a fundamental principle of the law that private property shall not be taken for the use of the public without just compensation, and the term "just compensation," in the sense of the law, means that it shall be paid for at a fair valuation. Protection to person and property is the paramount duty of government, and shall be impartial and complete. Constitution of 1866.

The right of way of Southwestern Railroad Company, including three hundred feet on each side of the same, is vested in that company. The fourth section of its charter vests the fee simple of the land constituting the right of way in the company, and it is the private property of that corporation; and the Southern & Atlantic Telegraph Company have not the legal right permanently to appropriate any part of its right of way — its private property — for the erection and construction of its telegraph line, without first paying the company therefor. Does the act of the general assembly under which the defendant claims the right to appropriate and use the complainant's right of way, provide for such payment as is contemplated by the fundamental law of this State? The act simply provides for an arbitration to assess and award the damages sustained by reason of the location of the telegraph line of the defendant (a foreign corporation), on the right of way of the complainant's road. There is no provision made in the act for the enforcement of the award against the property of the defendant,

Southwestern Railroad Co. v. Southern & Atlantic Telegraph Co.

either by a judgment thereon or otherwise. The complainants could not enforce that award for damages, except by a common-law suit instituted for that purpose. There is no remedy provided by the act for the enforcement of the award, even if the parties should voluntarily consent to submit the question of damages to arbitration; and if they should not voluntarily consent or fail to do so, there is no provision made to compel them. Besides, it is a fundamental principle of the law, as old as *Magna Charta*, that no person, either natural or artificial, shall be deprived of his property but by the judgment of his peers and according to the law of the land. The constitution of 1868 declares "that the right of trial by jury, except where it is otherwise provided in this constitution, shall remain *inviolable*."

There is no provision in the act for an appeal from the award of the arbitrators to any court so as to have the question of damages tried by a jury, and a judgment entered upon their verdict binding the defendant's property, and the result would be, that the complainant would be deprived of his private property for the benefit of the public (assuming that its appropriation by the defendant is for the benefit of the public interest), with no other security for its payment than an award of the three arbitrators against a foreign corporation, with no remedy provided by the act for its enforcement against the property of the defendant. This is not such a just compensation for the taking of private property for public use as the fundamental law of the State contemplates. In the case of *Doe ex dem. of Carr v. The Georgia Railroad Company*, 1 Kelly, 532, the question whether a *judgment* against the company for the damages assessed, to be enforced by the ordinary process of the court, or adequate security being given by the company to the landholder to pay the damages, was such a just compensation for the public use of private property as contemplated by the constitution, was not decided in that case, but left as an open question. But in the act of 1872, under which the defendant claims the right to take the complainant's private property for public use, there is no provision made for even a *judgment* on the award, or any other means provided for its enforcement against the property of the defendant; no provision made for a trial by jury on an appeal from the award, so as to entitle the complainant to a judgment on the verdict of a jury for the damages which would bind the property of the defendant. Under the provisions of the act of 1872, there is no security

Stokes v. The State of Georgia and the County of Lee.

or protection given to the complainant for taking its private property for the use of the public, unless the defendant chooses *voluntarily* to pay for it. As was said in the case of *Parham v. The Justices of Decatur County*, 9 Ga. 355, "The progression of this age requires the frequent exercise of the right of eminent domain, the necessity of right and liberty require that the citizen be paid when he is injured by it; and this court is here to see to it *that he is paid.*" In our judgment the act of 1872, under which the defendant claims the right to enter upon the complainant's right of way, its private property, for the purpose of erecting, constructing and maintaining its line of telegraph for the benefit of the public, is unconstitutional and void for the reasons heretofore stated, and that the injunction prayed for was the appropriate remedy in view of the facts of the case, and should have been granted. The only *apparent* interest which the Western Union Telegraph Company has in the question arises from the fact of its contract with the Southwestern Railroad Company for the *exclusive* use of its right of way, to operate and maintain its own line of telegraph, and being interested under that contract, it was a proper party to the bill to the extent of that interest only.

Let the judgment of the court below be reversed.

Judgment reversed.

STOKES, plaintiff in error, v. THE STATE OF GEORGIA AND THE
COUNTY OF LEE.

(46 Ga. 412.)

Bankruptcy — Lien of State for taxes.

A sale of the land by the assignee of a bankrupt does not divest the lien of the State upon the land for taxes due on it, even though sold by the assignee, free of incumbrance.

AN execution in favor of the State of Georgia and county of Lee for the tax of 1868, due on the "Bryan plantation," amounting to \$205, against Hunt and Bryan, was levied in August, 1869, upon

Stokes v. The State of Georgia and The County of Lee.

that place. A claim was interposed by Gilbert M. Stokes to said property. Upon the issue formed on the trial of the claim, it appeared that Goode Bryan, one of the defendants in *fi. fa.*, was adjudged a bankrupt on February 20, 1868, and discharged on December 4 of the same year; that William Oliver was appointed assignee, and a deed made to him by the register in bankruptcy on March 12, 1868, conveying all the property, real and personal, of said bankrupt; that the bankrupt court, by order dated June 9, 1868, directed the sale of the "Bryan plantation," free from incumbrances; that said plantation was duly sold, and a deed made by said assignee to Thomas Scrathin, on July 9, 1868; that said Scrathin conveyed said property to claimant by deed of same date.

The court instructed the jury, "that if it appears that the tax was assessed upon this land for the year 1868, as the property of Hunt and Bryan, then the bankrupt court had no power to divest the lien of the taxes on the land in favor of the State, and that no sale or order of said court could interfere with the right of the State to collect said tax, and that said land, in whosoever hands it might be, was still liable for the tax."

The claimant requested the court to charge to the contrary, which was refused. To the charge, as given, and to the refusal to charge, plaintiff in error excepted and assigns said rulings as error.

Hines & Hobbs and G. J. Wright, for plaintiff in error.

Lyon & Irvin, for defendant.

MONTGOMERY, J. 1. It has been said by a judge of a United States court that "the power of taxation is a sovereign political power, and a branch of the power of eminent domain." Brightley's Fed. D. 158. Georgia expressly retains this power over all property in the State, and follows the property for the payment of her taxes, in whosoever hands found. The tax payer cannot dispose of his property so as to divest her of this right. Code, 809, 810, 811. The bankrupt law does not attempt to deprive a State of this power. True, it makes provision for the payment of the State taxes, if the State chooses to come into the bankrupt court and claim them, but she cannot be compelled to come in. Hence, the assignee, by sale of a bankrupt's property, cannot divest the right of the State to enforce the payment of her taxes on the property, wherever it may be found.

The Georgia National Bank v. Henderson.

2. If it is true that the property is bound for the taxes, it makes very little difference who the owner of that property is, or how a tax execution describes it, so it is done with sufficient definiteness to enable the levying officer to ascertain the property.

Judgment affirmed.

THE GEORGIA NATIONAL BANK, plaintiff in error, v. HENDERSON.

(46 Ga. 487.)

Bills of exchange—Protest—Duty of bank with which paper is left for collection.

Plaintiff, the indorsee of an instrument drawn on a bank and directing it to "ninety days after date, pay to B. or order one thousand dollars," delivered it to defendant, a bank, for collection. At the expiration of the ninety days defendant presented said instrument for payment and protested it for non-payment without allowing days of grace. In an action against the bank for failing to have the instrument duly presented and protested, the drawers being insolvent, *held*, that the instrument was a bill of exchange and entitled to grace, and that the bank was liable for failing to have it duly presented and protested and notice given to the indorsers.

CASE by Henderson against the Georgia National Bank on the following alleged facts: That on August 4th, 1866, Massey & Herty made the following instrument, in writing:

"ATLANTA, GEORGIA, August 4th, 1866.

"Georgia National Bank, Atlanta, Georgia:

"Ninety days after date, pay to F. R. Bell, or order, one thousand dollars.

(Signed)

"\$1,000.

MASSEY & HERTY.

"Indorsed: JOHN D. POPE, F. R. BELL."

That Bell indorsed said bill of exchange to Pope, and Pope indorsed the same to plaintiff; that plaintiff delivered said bill of exchange to defendant for collection; that on the 2d of November, 1866, the ninetieth day from the date of said instrument, said defendant presented said bill of exchange for payment, and protested the same for non-payment, without allowing days of grace on the same, by which illegal action the indorsers were

The Georgia National Bank v. Henderson.

discharged from all liability; that the drawers are insolvent; that, by this course of action, defendant has become liable to plaintiff for the amount of principal and interest due on said bill of exchange.

The defendant pleaded the general issue. It appeared from the evidence that the plaintiff had originally sued the drawers and the indorser, John D. Pope; that he failed to recover against Pope, on the ground that he was discharged from liability on the instrument sued on, because no days of grace were allowed on the same; that Pope received no notice of protest, except the one of date November 2, 1866; that he notified the officers of the bank that said bill was entitled to days of grace, and requested that they should not demand payment of the same, or protest it for non-payment until after the three days of grace had expired; that Pope was solvent, and the drawers insolvent; that it was the custom of banks to charge for collections, unless the owner of the instrument to be collected kept a deposit account with the collecting bank.

The defendant moved for a nonsuit; the motion was overruled and defendant excepted.

The jury returned a verdict for the plaintiff for the sum of \$1,350.

The defendant moved for a new trial.

The motion for a new trial was overruled, and defendant excepted and assigns said rulings as error.

Collier, Mynatt & Collier, for plaintiff in error.

W. Ezzard, Hulsey & Tigner, for defendant.

MCCAY, J. 1. The general principle that a bank or any other collection agent taking a negotiable paper for collection is under obligations to have it duly protested for non-payment, seems unquestionable. The agent has the possession of the paper; generally the owners are at a distance; the notary will present and protest *only such* papers as are presented to him, and if the duty is not on the agent to see to it, there is, ordinarily, nobody in a situation to do it. And such is the current of authority.

2. This court has decided on this very paper, that it is a bill of exchange, and not a bank check; that it was entitled to grace, and as it is payable at and by a chartered bank, that protest and notice

The Georgia National Bank v. Henderson.

are necessary to bind the indorsers. *Henderson v. Pope*, 39 Ga. 361. I do not propose to go over the reasons for that decision; there is no doubt but that authorities may be found, and some of them of high character, in which such a paper as this has been held to be a bank check. One of the strongest of these cases is a decision by a no less able judge than Judge STORY. *Matter of Brown*, 2 Story, 502. But the current of the decisions appears to be that if the element of *credit* enters into the paper it is not a bank check, and that the mere making of the paper payable at a future day, being of itself an element of credit, makes it a bill of exchange, and not a bank check. A check is an order to the bank to pay the money of the drawer to the payee — it is an *appropriation* of money — cash. A bill of exchange is a matter of credit. It is drawn, looking to the future. The element of credit enters into it. This paper was not only payable at a future day, but it was avowedly *not* drawn upon the drawer's funds, and this the bank well knew, since its own books informed it that he had no funds there. Besides, this paper was *indorsed*, guaranteed by two indorsers other than the payee, and this appeared on the face of the paper. There was, therefore, none of the elements of a check in this paper, except that it was drawn upon a banker. Payable at a future time, not drawn upon any funds and guaranteed by two indorsers, it was a bill of exchange, issued and taken upon the *credit* of the drawer and indorsers.

Assuming, therefore, that this is a bill of exchange, and that by the failure of the bank to have it duly presented on the third day of grace, and due notice to be given to the indorsers, they were discharged as we have decided in the case of *Henderson v. Pope*, it follows that the holder has lost his right to go on the indorsers by the fault or negligence of the bank. *Prima facie*, the bank is liable for negligence, just as other agents are. But it is said that agents of all kinds, except carriers and innkeepers, are only liable to ordinary diligence, and this is true. A lawyer, doctor, or mechanic, indeed, any agent is not bound at all events. Ordinary skill will excuse a mishap, even of a doctor or lawyer, and it is said that this being a doubtful matter, the bank having acted in good faith, is not liable, because it mistook the law. A case very much in point is cited, and cases laying down this general doctrine of the degree of diligence required of agents undertaking to transact business, are numerous. For myself, I should have great doubt

The Georgia National Bank v. Henderson.

as to the liability of the bank, except for one thing. Whether this was a bank check or a bill of exchange may have been a doubtful matter—one upon which even lawyers, nay, judges of great eminence may differ. But the bank was distinctly informed by Mr. Pope, the indorser, that it was entitled to days of grace. In other words, that it was *considered* by him as a bill; as to him this would have clearly been a waiver of presentment on the first day of the three. A presentment and notice on the third day would have bound him in any event. This notice of Pope to the bank should have put the bank officers upon their guard. It was easy to have presented it on both days, and given notice of the non-payment on both days. Admitting that it was doubtful whether it was entitled to days of grace or not, attention was called to the fact by Pope's notice. It was an easy thing, and one that would occur to any prudent man to present it on both days. The bank was not obliged to decide the doubt. It might well have managed so as to save the plaintiff's right against the indorser's, in either event. Pope notified the bank of his claim that it was a bill. Was it not ordinary prudence to so act as to bind Pope, even if it was a bill? If there was but one way open, and the right way doubtful, ordinary skill, in determining the right way, may be all that is required. But here there were two ways open. One of them was sure. It was easy to take both. Notice was given that the way proposed was wrong. In my judgment, ordinary prudence required both to be taken, and for that reason I think the bank liable.

3. *Prima facie*, notes over due are not negotiated; they are dishonored—suspicious. *Prima facie*, every man who has the possession of a negotiable paper took it before due. Henderson has this paper now; the presumption is he had it before and at its maturity. And we think this is as well true in a suit of this kind as in a suit on the note. It was not necessary, therefore, for Henderson to prove that he was the holder of the paper at maturity.

Judgment affirmed.

WARNER, C. J., concurring. The plaintiff brought his action against the defendant to recover damages for carelessly and negligently performing its duty in relation to the collection of a certain bill of exchange, placed in its hands for that purpose, of which the following is a copy:

The Georgia National Bank v. Henderson.

"ATLANTA, GA., August 4, 1886.

"Georgia National Bank of Atlanta, Ga., ninety days after date, pay to F. R. Bell or order \$1,000

"(Signed)

MASSEY & HERTY."

"Indorsed: F. R. BELL, JOHN D. POPE."

The plaintiff alleges that the defendant protested the bill and gave notice to Pope, the indorser (the only responsible party to the bill) the day it became due, without allowing the three days of grace, as he should have done, whereby Pope, the indorser, was discharged and he lost his debt. When the case of *Henderson v. Pope* was before this court at a former term (see 39 Ga. 361) this court held and decided that the above-described paper was a bill of exchange, and not being payable either at *sight* or on *demand*, was entitled to the three days of grace before being protested for non-payment, and that Pope, the indorser, was discharged. And the question now is, whether the defendant is liable, under the law, to the plaintiff for the loss which he has sustained in consequence of the negligent and unskillful manner in which it performed its duty in undertaking to collect the bill placed in its hands for that purpose. Contracts implied by reason and construction of law arise upon the supposition that every one who undertakes any office, employment, trust or duty, contracts with those who employ or trust him to perform it with integrity, diligence and skill; and if, by his want of either of those qualities, any injury accrues to individuals, they, therefore, have their remedy in damages by a special action on the case. 3 Black. Com. 163. The defendant undertook to collect the plaintiff's bill for the customary compensation, and was bound to exercise the necessary skill and diligence for the accomplishment of that object, to know when the bill became due, and in case of non-payment to have it protested, and due notice given to the parties thereto in the manner required by law; and if the defendant failed to do so, it is liable to the plaintiff for the damages sustained in consequence of such failure and unskillful conduct. The defendant was bound to know, when it undertook the collection of the paper for the plaintiff, that it was a bill of exchange, that it became due on the last day of grace, the same not being due at *sight* or on *demand*, that in case of non-payment on the last day of grace, it should then be protested and notice given to the indorser in order to hold him liable for the payment

The Georgia National Bank v. Henderson.

of the bill. If the defendant did not know these things, then it ought to have taken down its sign and quit the business of collecting commercial paper. The defendant, however, did seem to know that the bill should be protested for non-payment, and notice given to the indorser, and undertook to do it, but did it in such a negligent and unskillful manner that the indorser was discharged in consequence thereof, although the evidence in the record shows that the defendant was requested not to protest the bill for non-payment until the last day of grace.

But it is said that the defendant did not know that days of grace were allowed on this bill of exchange. Well, all I have to say in regard to that is, that such has been the law, at least, ever since Blackstone wrote his commentaries on the common law, and has been so recognized by the commercial world ever since that time, and long before. It is also said that the defendant did not know that the bill of exchange was entitled to the three days of grace because it was drawn upon and payable at a chartered bank. A chartered bank is an artificial person, and a bill of exchange may as well be drawn upon and made payable to an artificial person as to a natural person, the three days of grace are allowed as well on bills drawn upon and payable to artificial persons as to natural persons; there is no distinction as to the time when a bill of exchange becomes due between one drawn upon and payable at a bank and one payable to a natural person; both become due on the last day of grace, unless, under our Code, the bill is payable at a bank *on sight* or *on demand*. Why should there ever have been any difference as to the allowance of days of grace between a bill drawn upon and payable to a chartered bank and one drawn upon and payable to a natural person? The truth is, the same principles of commercial law apply to both, so far as the allowance of days of grace are concerned, and did, when this bill of exchange was placed in the defendant's hands for collection, except checks drawn on a bank payable at *sight* or on *demand*.

To say that any *doubt* existed among lawyers or commercial bankers as to whether a bill, drawn upon and payable at a chartered bank ninety days after date, was not entitled to the three days of grace at the time the paper was placed in the defendant's hands for collection, would be to impeach their knowledge of commercial law for the purpose of making out a *plausible* defense for the defendant in this case, which the law does not uphold or sanction.

The Georgia National Bank v. Henderson.

Downer v. The Madison County Bank, 6 Hill, 648. Having concurred in the judgment of this court, in *Henderson v. Pope*, that the indorser was discharged for the want of a legal protest and notice to him, I will not now *stultify* myself by holding that the defendant is not liable for its negligence and unskillful conduct in causing the plaintiff to lose his debt. In my judgment, there was no error in the charge of the court to the jury, and the verdict was right, under the evidence in the case.

MONTGOMERY, J., delivered an elaborate dissenting opinion.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

CRONLY, appellant, v. HALL.

(57 N. C. 2.)

Contract — illegal consideration. Order on Confederate Government.

Where an agent of the war department of the Confederate government issued the following instrument: "Confederate States Depository, Wilmington, pay Messrs. Collie & Co., or order, twenty thousand dollars," which was indorsed by the payees to the defendant, who indorsed it to another person, by whom it was indorsed to the plaintiff, it was *held* (RODMAN, J., dissenting), that the instrument was illegal; that such illegality was apparent upon its face, and extended to all the indorsements.

ASSUMPSIT. The plaintiff declared, as indorsee, against the defendant, as indorser of an instrument, in the following words and figures:

"AGENCY WAR DEPARTMENT,

"WILMINGTON, January 18, 1865.

"Confederate States Depository, Wilmington, pay Messrs. Collie & Co., or order, twenty thousand dollars.

(Signed)

"J. M. SEIXAS.

"\$20,000.

"*Agency War Dep't.*"

Pleas, general issue, illegality of consideration, and that the instrument was given in aid of the rebellion.

The instrument was indorsed by the payees, Collie & Co., to the defendant, and by the defendant to one Grady, and by Grady to the plaintiff.

On the trial, the handwriting of the drawer and of all the indorsers was proved; and it was also proved that Seixas, the drawer was the agent of the Confederate States war department at Wilmington, and that the plaintiff purchased the instrument from the last indorser, Grady, on the 20th January, 1865, paying therefor the amount called for by it in Confederate currency.

Verdict for defendant.

There was a rule for a new trial which was discharged, and a judgment given for the defendant, from which the plaintiff appealed.

Battle & Son, for plaintiff. 1. The instrument is a bill of exchange, and as such can as well be drawn by a government as by an individual. See Judge McLEAN's opinion in *United States v. Bank of the United States*, 5 How. 405 (16 Curtis, 441). See also *United States v. Bank of the Metropolis*, 15 Pet. 392 (14 Curt. 116).

2. The mere dealing in Confederate securities was not illegal. *Phillips v. Hooker*, Phil. Eq. Rep. 193; *Haughton v. Merony*, 65 N. C. 124.

3. The illegality of the consideration, supposing that it existed between the original parties, did not extend to the transactions between the indorsers and indorsees, because such transactions were fair and *bona fide*. Besides, each indorsement was the drawing of a new bill upon a good and sufficient consideration. Story's Prom. Notes, § 192, n. 2; 2 Kent's Com. 79, 80; *Parr v. Eliason*, 1 East, 92; Bailey on Bills, 149 and 179.

Of the cases cited from the 66 N. C. Rep., the first, *Baucum v. Smith*, 537, is not against us, and the second, *Kingsbury v. Suit*, 601, is in our favor.

M. London, for defendant.

BOYDEN, J. Whether the paper upon which the indorsements in this case were made is a bill of exchange it is unnecessary for the court to decide, as the instrument shows a trading with the war department of the so-called and now defunct Confederate government. The sole object and business of this department during its

Cronly v. Hall.

existence was to aid in carrying on the war against the rightful government of the United States, and consequently all trading directly with that department was illegal and void, and no sale growing out of such trading could be maintained in the courts of the rightful government by the party thus trading, no matter what the form of the instrument evidencing such illegal transaction. *Martin v. McMillan*, 67 N. C. 486; *Clemmons v. Hampton*, 64 id. 264; *Critcher v. Halloway*, id. 526; *Kingsbury v. Flemming*, 66 N. C., and *Baucum v. Smith*, id. 537.

In our case the illegality appears upon the face of the instrument, and thereby every subsequent holder, whether by indorsement or otherwise, is affected with notice of this illegality, and can have no better or higher claim to maintain an action thereon in the courts of the rightful government, than the original holder who made the illegal trade with the war department. Had the Confederate government maintained its independence, no doubt the courts of that government would have held this contract legal; but even in that case a question might arise whether the indorsement, by an individual, of this contract of the government would render the indorser liable to the indorsee, or be regarded as a mere mode of furnishing evidence of the person entitled to receive payment from the government, as in the case of the indorsement of one of our State bonds. Certainly those who have indorsed such bonds in our State have done so under the idea that they did not thereby make themselves personally liable, as indorsers, to pay the bonds in case the State failed to do so, but these indorsements have been made as preserving evidence, to the government, of the party who was entitled to receive payment.

There is no error. This will be certified.

RODMAN, J., dissenting. The original bill of course was illegal and void. But as each indorsement is the drawing of a new bill, it seems to me that the indorsers have no connection with the original illegal contract, but may maintain actions between each other.

Judgment affirmed.

BLAKELY V. PATRICK, appellant.

(87 N. C. 40.)

Mortgage of chattels — description — possession.

A mortgage by a buggy-maker of "ten new buggies," without delivery of possession, he having more than ten on hand at the time, held ineffectual to pass title to any particular buggies or to any interest in the buggies on hand; and the mortgagee cannot maintain an action for the recovery of ten new buggies in the possession of the mortgagor, or his personal representative.

THE action was commenced in January, 1869, by S. T. Jones and H. T. Bennett, under the name of S. T. Jones & Co., as plaintiffs, to recover possession of "ten new buggies" from the defendant as administrator of S. T. Stilley, deceased; and they having complied with the provisions of title 9, chapter 2, of the C. C. P.; nine new buggies found in the defendant's possession were delivered to them by the sheriff. The plaintiffs became bankrupts, and S. M. Blakely, having been appointed their assignee, was made party plaintiff as such. He claimed title under a mortgage, executed by Stilley to S. T. Jones & Co., in July, 1867, which purported to convey, with other personal property, "ten new buggies," to secure certain notes which were payable January 1, 1868; and the mortgage was offered in evidence. The complaint goes on to state that Stilley was a manufacturer of buggies, dependent upon his trade for support, and the property conveyed in the mortgage was left with him to enable him to prosecute his business; that he died in November, 1867, and the defendant soon thereafter being appointed his administrator, "took into his possession the entire personal estate of the said S. T. Stilley, among which were the ten new buggies mentioned in said mortgage."

The defendant's answer, admitting the other allegations of the complaint, alleges that all the buggies on hand at the execution of the mortgage (more than ten in number) had been sold by Stilley, and that the buggies claimed by the plaintiffs were made afterward and not embraced in the mortgage. It denied that title to any particular buggies passed under the mortgage. Debts of higher dignity than the plaintiff's were also set up as a defense. It was in evidence on the trial that the mortgage was executed in Newberne,

Blakely v. Patrick.

and that the plaintiff at the time had fifteen new buggies in his shop in Greene county, where he lived.

The jury returned a "verdict finding all issues in favor of the plaintiffs and assessed his damages at \$127.25." The court gave judgment accordingly, and the defendant appealed.

Battle & Son, for plaintiff.

Smith & Strong, for defendant.

PEARSON, C. J. This is an action to recover the possession of personal property, to wit: ten new buggies, and damages for the detention. It appears by the *record proper*, that the provisional remedy was resorted to. Under it the sheriff seized nine new buggies that were of the estate of the intestate of defendant, and delivered them to the plaintiff. The judgment is that the plaintiff retain possession of the said property and also recover \$127, for damages and costs.

This reference to the *record proper* is made to prevent a confusion of ideas that might be caused by the circumstance that, in the statement of the case his honor says, in charging the jury: "This is an action for damages, for the *conversion of the ten new buggies by the defendant.*" An action to recover the possession of personal property, where the provisional remedy is not resorted to, is in effect the old action of *detinue*, and where it is resorted to the action is in effect the old action of *replevin*. *Jarman v. Ward*, at this term.

In either case, to maintain the action, the plaintiff must show title or a right to the present possession of the thing which is the subject of the action, and the thing sued for must be specific, and be identified by a sufficient description. *O'Neal v. Baker*, 2 Jones, 158; *Jones v. Morris*, 7 Ired. 370.

The defendant's counsel asked his honor, in writing, for this instruction, "if the jury believe there were more than ten new buggies in the lot in Stilley's possession at the time the mortgage was made, and *the ten* were not separated by Stilley and Jones from the rest of the lot, then the plaintiff cannot recover?" which was refused. There is error. *Waldo v. Belcher*, 11 Ired. 609. That case is decisive of the question. It was fully argued by counsel on both sides, and, after due consideration, an opinion was filed, which is sustained by the reason of the thing and by the authorities cited. We do not feel called on to review it.

In our case the complaint sets out that Stilley was a manufacturer of buggies, and "the property was left with him, to enable him to prosecute his business," leaving it to be inferred that the buggies on hand at the date of the mortgage were disposed of by Stilley, in the course of his business, and he, from time to time, made other buggies and put them in the lot, in the place of such as he had sold. The answer distinctly avers that the buggies on hand at the date of the mortgage were sold, and the buggies now claimed have been made since the mortgage.

This fact seems not to have been adverted to on the trial, and yet it has a direct tendency to show that the present action is entirely outside of the mark, and "hits at" a set of buggies different from those on hand, which it is supposed the parties attempted to convey at the date of the mortgage.

The legal effect of the mortgage, in this instance, was not to pass the title to ten new buggies as an executed contract or sale; but *if it has any effect at all*, it is to create an *executory contract*, or an agreement to sell and deliver ten new buggies, for a breach of which contract damages may be recovered. We qualify the proposition; for here there was no price paid, and the only consideration for the contract was to secure debts; that is, a promise to secure the performance of another promise. But whether an action be brought on the latter promise, or on the first promise, to wit: the "two notes," the defendant, who is the administrator of the debtor, can avail himself of the want of assets, as he has done in this case, and the plaintiff cannot lay hands on ten buggies that happened to be on hand at the death of the debtor, but must be content to take his chances with the other creditors, according to the course of administration.

In considering the question, it was suggested may not the mortgage deed be allowed to have the effect of making Jones a tenant in common with Stilley in the lot of fifteen new buggies, so as to give him three undivided fifth parts, and bring it within *Powell v. Hill*, 64 N. C. 169? The reply is, that view, even if tenable, will not aid the plaintiff to maintain this action; for it is held in *Powell v. Hill* that the remedy is not by a civil action to recover the possession, but by a special proceeding before the judge of probate for partition.

But a more decisive reply is: In *Powell v. Hill* the relation of tenants in common was created by the agreement, according to which the plaintiff was to work on the farm and to have a certain

Young v. Lathrop.

part of the crop for his labor (say one-third part), and the crop being made and housed, it is held that he was a tenant in common, entitled to have his part on partition. So it may be admitted that if Stilley had agreed to let Jones have an undivided part of the lot of new buggies (say two-fifths parts) the relation of tenants in common would have been created. But that is a very different matter from an agreement to let Jones have *ten* of the lot of fifteen new buggies, without specifying or setting apart the identical ten that he was to have. In the former case no delivery, either actual or constructive, was required to establish the relation of tenants in common. Indeed, the idea of delivering or setting apart ten of the number would be inconsistent with the relation by which he was to be entitled to two-fifths part of the undivided whole; whereas, in the latter case, the very purpose was that ten of the number should be the *sole property* of Jones. To vest the title or ownership in any particular buggies, it was necessary to set them apart, so as to make a constructive delivery, and effect an executed contract; in the absence of such identification, the agreement, as we have seen, was executory only.

Suppose Jones to be entitled as tenant in common to two-fifths parts, and some one or two of the buggies had been destroyed, the loss would fall upon both of the tenants in common, and Jones would only have the two-fifths parts of what was left; but suppose Jones to be entitled to ten new buggies of the lot of fifteen, under the executory agreement, and some one or two of these had been destroyed, the loss would fall on Stilley, and Jones would call for ten new buggies. Note the diversity. There is error.

Venire de novo.

YOUNG V. LATHROP, appellant.

(67 N. C. 68.)

Fraudulent conveyance — bona fide purchaser.

A fraudulent grantee of land conveyed it to a *bona fide* purchaser for value without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and tested of the term where it was obtained. *Held* (BOYDON, J., dissenting), that the title of the *bona fide* purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor.

EJECTMENT for the recovery of a tract of land, and for damages for the detention of it. The answer denied the ownership of the plaintiff and claimed that the title as well as the possession was in the defendant. The referee made the following report:

1. That on the 27th day of November, 1865, one William H. Hughes was the owner in fee simple of the land, with the improvements thereon, mentioned in the pleadings, and being in possession of the same conveyed it by a deed proper in point of form to his brother Thomas C. Hughes and his heirs; that the consideration recited therein was the sum of \$5,000, alleged to have been paid by the said grantee to the said grantor; that at the time of the execution of the said deed the said grantor was indebted to various creditors, in amounts much larger than the value of his property, and that he was utterly insolvent; that no part of the said consideration of \$5,000 was paid, or was intended to be paid by the said grantee to the said grantor, and that the said deed was executed solely for the purpose of saving the land therein mentioned for the benefit of the grantor's family, at the expense of his creditors, by preventing its being applied to the payment of their debts; that this deed was duly proved and registered.

2. That at the June term, 1866, of the circuit court of the United States for the fourth circuit in the district of North Carolina, H. B. Loney & Co., citizens and residents of the city of Baltimore and State of Maryland, obtained a judgment against the said William H. Hughes, a citizen and resident of the State of North Carolina, for the sum of \$1,960.12, due 23th December, 1865, subject to a credit of \$100, paid 23th January, 1866, and for costs, also for three per cent additional damages on the principal sum, which said judgment was obtained on a bill of exchange drawn at Baltimore on the 28th day of October, 1865, and payable sixty days after date and accepted by the said William H. Hughes.

3. That upon the said judgment a writ of *feri facias* was duly issued from the said court on the 18th July, 1866, tested of the said June term, 1866, and returnable to the ensuing November term thereof, which said writ was returned by the marshal of the United States for the district of North Carolina, to whom it had been directed, with an indorsement that on the 9th day of November, 1866, it was levied upon the land mentioned in the present pleadings; and thereupon a writ of *venditioni exponas* was issued from the said court on the 29th December, 1866, directed to the

Young v. Lathrop.

said marshal, and commanding him to sell the said land, which said writ was made returnable to the June term of the said court 1867; that by virtue of the said writ, the said marshal duly exposed the said land for sale at auction, when it was bid off by Joseph B. Batchelor, Esq., for the sum of \$16, of which a due return was made by the said marshal; that the sale was made the 6th of May, 1867, the said Batchelor bidding for his clients, the plaintiffs in the judgment, and that with their consent, he, on the 20th day of January, 1869, transferred in writing his bid to the present plaintiff, Isaac J. Young, to whom the said marshal on the said 20th day of January, 1869, executed a deed which was afterward duly proved and registered.

4. That on the 24th day of October, 1866, the said Thomas C. Hughes, the grantee, as hereinbefore stated, of the said William H. Hughes, by a deed duly executed, reciting a consideration of \$7,000, conveyed to the defendant, Richard D. Lathrop, of the city and State of New York, and his heirs, the same land, which deed was duly stamped, proved and registered; and on the same day the said William H. Hughes executed to the said Richard D. Lathrop and his heirs a quitclaim deed for the same land, which has not been either stamped or proved and registered. That at the time when the said deeds were executed, the firm of Lathrop, Ludington & Co., of which the said Richard D. Lathrop was a member, had claims against the said William H. Hughes amounting to \$9,998, for which the said Thomas C. Hughes, and also George B. Hughes and George Badger Harris, were bound as sureties; and the said deed from the said Thomas C. Hughes to the said Richard H. Lathrop was given in part payment of the said claims, with the interest due thereon. Whether the said deed from Thomas C. Hughes to Richard D. Lathrop was executed *bona fide*, and without any notice, to the grantee of the judgment against the said William H. Hughes in the Federal court as hereinbefore mentioned, and also without notice of the alleged fraudulent conveyance from William H. Hughes to his brother Thomas C. Hughes, hereinbefore mentioned; and also whether the said deed was intended to be absolute or only a mortgage, are matters in which the testimony is conflicting. * * * After a careful consideration of all the testimony I find the facts to be, that the defendant was a *bona fide* purchaser of the land in question for a valuable consideration, without notice of the aforesaid judgment in the Federal court, and of the fraud in

Young v. Lathrop.

the execution of the said deed from William C. Hughes to his brother Thomas C. Hughes. I further find that the deed from Thomas C. Hughes to the defendant, Lathrop, was an absolute one to him and his heirs, and was not, nor was it intended to be, a mortgage.

5. That the evidences of debt, which formed the consideration of the deed of the said Thomas C. Hughes to the defendant, were founded on a legal consideration, and were sufficient for the purposes of the said conveyance from the said Thomas C. Hughes to the defendant, provided the said Thomas C. Hughes had, as against the creditors of the said William H. Hughes, the right to make the conveyance, I find as conclusions of law :

1. That the deed from the said William H. Hughes to the said Thomas C. Hughes, mentioned in my finding of the facts, was and is a fraud upon the creditors of the said grantor, and is, therefore, null and void as to them.

2. That the land mentioned in the said deed of conveyance, notwithstanding the formal execution of the same, remained, as to the creditors of the said William H. Hughes, his property, and that the writ of *feri facias* which was issued on the judgment of F. B. Loney & Co., obtained at the June term, 1866, of the circuit court of the United States for the district of North Carolina, which said writ was tested of the said term and was levied on the said land, was a lien on the same from the date of its teste, and the purchaser of the said land at the sale made by the marshal, under the *venditioni exponas* issued from the November term of the said court, obtained thereby a good title to the same.

3. That the attorney of the plaintiffs, in the said judgment, who bid off the land for them, had the right, with their consent, to transfer his bid to the plaintiff in the present action, and the deed from the marshal to him gives him a good title to the said land. And I therefore direct judgment to be entered for the plaintiff.

1. That he recover the land mentioned in the pleadings.

I direct, further:

2. That judgment be entered for the plaintiff, that he recover, as damages for the detention of the said land, at the rate of \$200 *per annum* during the time of such detention, making the sum of \$850."

Defendant appealed.

Young v. Lathrop.

W. H. Young & Batchelor, for plaintiff.

Mr. Lanier, for defendant.

PEARSON, C. J. The point is this: A debtor makes a voluntary deed of land for the benefit of himself, with an intent to defraud his creditors. Afterward a creditor takes out execution upon a judgment against the debtor for a pre-existing debt and puts it into the hands of the marshal. Afterward the fraudulent grantee, for a valuable consideration and a full price, makes a *bona fide* sale, and executes a deed to the defendant for the land, the defendant having no notice of the fraud and covin between the debtor and the grantee. This sale and deed were *subsequent to the teste* of the execution. Afterward the marshal sells under the execution, and the plaintiff becomes the purchaser and takes the deed of the marshal. Which has the title? The defendant, who was the first to purchase and take a deed from the grantee, or the plaintiff, who purchased under an execution, the teste of which was prior to the defendant's purchase?

It is settled, without any conflict of the authorities, that a purchaser of a fraudulent donee, *bona fide* and for a valuable consideration at a full price, without notice of the fraud, acquires a good title under 27 Eliz., against a subsequent purchaser of the donor, *bona fide* and for valuable consideration at a full price.

It is also settled, but after some conflict of the authorities, that a purchaser of a fraudulent donee, *bona fide* and for a valuable consideration at a full price, without notice of the fraud, acquires a good title under 13 Eliz., against creditors, and purchasers under their execution for a debt existing at the time of the fraudulent conveyance, at a sale subsequent to the sale of the fraudulent donee. For both of the purchasers are *bona fide*, for valuable consideration, and the one to whom the first sale was made is preferred, under the maxim — "*Prior est in tempore, portior est in jure.*" Roberts on Fraudulent Conveyances, 392, 462. and the cases there cited. *Anderson v. Roberts*, 18 Johns. 515; *Bean v. Smith*, 2 Mason, 252. The *dictum* of RUFFIN, J., in *Hoke v. Henderson*, 3 Dev. 12, is put on the ground of unfairness to the creditors of the fraudulent donor. He gives no weight to the *proviso* in favor of *bona fide* purchasers, and after setting on the side of the creditors, waives a discussion. "because the point is

not presented by the facts of the case, for the land was sold under the execution against the donor, before the sale on the side of the fraudulent donee."

This question is put at rest by Rev. Code, chap. 50, §§ 1, 2 and 4; for the proviso (which will be again referred to) applies to the first section, which is 13 Eliz., and also to the second section, which is 27 Eliz. Whatever may be said about fairness or unfairness toward *creditors*, the legislative will gives preference to a *bona fide purchaser, for valuable consideration at full price and without notice of the fraud and covin*. In our case the plaintiff says he is taken out of the operation of this maxim, by the effect of the teste of the execution under which he claims title; for the execution relates back to the teste, and gives to the creditor a *lien* on the property of the debtor, which lien is prior in point of time to the sale of the fraudulent donee to the defendant.

The case turns upon this point. No direct authority was cited. In *Bean v. Smith, supra*, at p. 279, Justice STORY, after denying the distinction between the operation of the 27 Eliz. and the 13 Eliz., in respect to *bona fide* purchases for valuable consideration without notice, says: "I have searched with some diligence to ascertain if that distinction has been recognized in any adjudged case or in any elementary treatise in England. Hitherto my researches have been unsuccessful. In *Wilson v. Wormal*, Godbolt, 161, however, Lord Chief Justice COKE, than whom no man was probably better acquainted with the statute in its true construction, lays down a doctrine that in terms denies the distinction. He says that, "if lessee for years assign over his term by fraud to defeat the execution (upon a judgment against him), and the assignee assigneth the same unto another *bona fide*, that in the hands of the second assignee it is not liable to execution."

Godbolt's Reports are not in our library, and we are not able to see certainly, from this extract, that the execution bore teste before the *bona fide* assignment; but we infer the execution was in the hands of the sheriff, from the words "assign one his term by fraud to defeat the execution (upon a judgment against him)." If so, this is a direct authority for the position that a *bona fide* sale of the fraudulent donee, although after the teste of the execution, passes a good title to the purchaser against the creditor, and a purchaser at a sale under the execution subsequently made.

Let us see how the question stands, "on the reason of the thing."

Young v. Lathrop.

A *lien* does not vest the title in the creditor, but leaves it in the debtor until a levy and seizure in respect to personal property, and until the sale under the execution in respect to land. This is settled. *Frost v. Etheridge*, 1 Dev. 30.

The effect of a *lien* is merely to tie up the land in the hands of the debtor, so that he cannot, either by a voluntary conveyance or by a conveyance for valuable consideration, deprive the creditor of his right to have the land sold for the satisfaction of the execution. So, the *lien* created by a *lis pendens* does not divest the title, but merely ties up the property until the determination of the suit. In our case, before the teste of the execution, the debtor had passed the land to the donee, and although the conveyance was fraudulent, still it effectually passed the title and was valid as between the donor and donee. So, when the execution issued it had nothing to operate on, for the debtor had nothing and the *lien* created by the teste could not take effect as to him, and it could not take effect on the land in the hands of the donee, except by force of the 13th Eliz., which makes the conveyance void as to creditors. If the donee had retained the land until it was sold under the execution, as the property of the donor in respect to his creditors, the purchaser would have acquired a good title. But the donee did not retain the land, but sold it to the defendant, who was a *bona fide* purchaser for valuable consideration, at a full price, and without notice of such fraud, before it was sold under the execution; and the defendant insists that he is protected by the proviso in the statute, 13 Eliz., which has the effect to make the first section inoperative, and to render the original conveyance valid as against creditors in favor of such *bona fide* purchaser, and if so the creditor could acquire no *lien*, for the debtor had parted with the land, and in respect to the *bona fide* purchaser the conveyance was valid, both in regard to the debtor and his creditor. In other words, if the purchaser comes within the proviso, that takes from the creditor all benefit which he would otherwise have had under the first section.

The proviso is in these words (section 4, chapter 50, Rev. Code): "Nothing contained in the foregoing sections shall be construed to impeach or make void any conveyance of any lands *bona fide* made upon and for good consideration to any person not having notice of such fraud."

It is settled that good consideration means valuable consideration, or a fair price. We can see nothing to take the conveyance to the

defendant out of the operation of this proviso, or any principle upon which it can be impeached or made void in the face of these express terms. The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was tainted, by allowing the *bona fides* and the full valuable consideration of the second conveyance to supply the want of these qualities in the first, so as to perfect the title of the *bona fide* purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchase from being "impeached and made void." When the plaintiff says, "My title goes back to the teste of the execution under which I claim," the defendant replies, "My title goes back to the original conveyance made by the debtor, which is purged of the fraud of which I had no notice;" and when the plaintiff says, "the first section makes all conveyances made in fraud void as to creditors," the defendant replies, "the fourth section makes my title good, and declares that nothing contained in the first section shall be construed 'to impeach or make void my title.'"

It was said on the argument, "This effect given to the proviso will defeat the object of the act, which was to protect creditors," for debtors will make fraudulent deeds on purpose to enable donees to sell and defeat creditors. That may be so; but the object of the proviso evidently is to protect *bona fide* purchasers, and when the question is, shall the creditor lose his debt or the *bona fide* purchaser his money, the proviso gives the preference to the purchaser. The result is, that the first *bona fide* purchaser, whether under the donee or under the execution against the donor, acquires the title.

The judgment below is reversed upon the facts found by the referee.

BOYDEN, J., dissented.

Burroughs v. The North Carolina Railroad Company.

BURROUGHS V. THE NORTH CAROLINA RAILROAD COMPANY.

(87 N. C. 376.)

Sale of stock — dividends.

A sale of shares of stock in a railroad company carries with it the dividends declared by the company, when they are to be paid at a day subsequent to the transfer of the stock.

Therefore, when the North Carolina Railroad Company declared a dividend on the stock in said company, on the 16th day of February, 1870, to be paid on the 1st days of April and July thereafter, and the owner of certain shares of such stock sold and transferred the same on the 17th day of February. *Held*, that the purchaser of said shares of stock acquired the dividends, as well as the stock.

ACTION on the following agreed case: The plaintiffs, on the 16th day of February, 1870, were the owners of thirty-four shares of stock in the North Carolina Railroad Company, upon which a dividend of six per centum was declared on the said 16th of February, 1870, three per centum payable on April 1, 1870, and three per centum on 1st July, 1870. The plaintiffs sold and transferred said stock on the 17th February, 1870, to S. H. Wiley. The plaintiffs made due demand for the payment of the dividends, before the date fixed for the payment. The payment was refused. The dividend was paid to S. H. Wiley, the assignee. The certificate of stock, issued to plaintiffs, was canceled, and a new one issued to Wiley on the 21st February, 1870.

The following resolution is also made a part of the case agreed:

"The board of directors of the North Carolina Railroad Company do declare an annual dividend of six per cent on the capital stock of this company, for the fiscal year ending May 31, 1870. Three per cent to be paid on 1st April, and three per cent on the 1st July, 1870, and the transfer books be closed from 1st day of March to 1st April, and from 1st June to 1st day of July."

The court was of opinion that the plaintiffs were entitled to recover. Judgment accordingly. From which judgment defendant appealed.

Jones & Johnston, for plaintiffs.

J. H. Wilson, for defendant.

Burrongs v. The North Carolina Railroad Company.

RODMAN, J. On 16th February, 1870, the North Carolina Railroad Company declared a dividend by the following resolution: "The Board of Directors of the North Carolina Railroad Company do declare an annual dividend of six per cent on the capital stock of this company, for the fiscal year ending the 31st of May, 1870. Three per cent to be paid on 1st April, and three per cent payable on the 1st day of July, 1870, and the transfer books be closed from 1st day of March to the 1st of April, and from the 1st day of June until the 1st day of July."

On the 17th February, the plaintiffs, in writing in the usual form, at the foot of their certificate for thirty-four shares of stock in the company, transferred the same to Samuel H. Wiley for value, and authorized F. A. Stagg, attorney, to transfer the same on the books of the company. The transfer was accordingly made on the 21st February. The certificate of stock to the plaintiffs was canceled and a new certificate issued to Wiley. On the same day plaintiffs notified the company that they claimed the dividend declared on 16th February. The company, nevertheless, paid the same to Wiley, and this action is brought to recover it. One would suppose, that in a case which must be of frequent occurrence, there would be proved some established usage, or that some decided cases could be found fixing the rights of the parties. If there be any established usage, either general or special to this corporation, there has been no evidence of it offered in this case. And the learned counsel inform us that they have been able to find no authority whatever on it. The absence of authority is the more remarkable, as the rule as to a dividend following the stock or not, under the present circumstances, would seem to be of a general nature, not confined to sales, but covering the case of a life tenant with remainder, when the life tenant dies after the dividend is declared, and before it is payable, and the case of a will bequeathing stock when the testator dies under the like circumstances.

Before proceeding to the particular consideration of this case, it is necessary to observe:

1. It was clearly within the power of the seller and purchaser of the stock in this case, to have contracted with respect to the dividend declared on the day before. But,

2. If we assume, for the moment, that the effect of the resolution declaring the dividend, was to make it payable to whoever should appear by the books of the company to be the owner of the stock on

Burroughs v. The North Carolina Railroad Company.

the days on which it was payable, then, notwithstanding any different contract between the plaintiffs and their vendee, the company was justified in paying to the vendee, and the redress of the plaintiffs would be by an action against their vendee for money had and received.

It is important to notice that the question is, not as to the contract between plaintiffs and Wiley, but, to whom did the company agree to pay the dividend; for if the company agreed to pay one who turned out to be Wiley, its liability cannot be affected by any collateral agreement between the plaintiffs and Wiley (even if there were express proofs of such) without its consent. Without advert- ing to the principle, that the contract between plaintiffs and Wiley must be supposed to have been made in reference to the resolution of the day before, as to which it does not appear that either party had any advantage in point of knowledge; yet, in the absence of a contrary agreement, the sale must necessarily have been of the subject-matter with its rights and incidents at the date, or perhaps when the transfer should be completed.

So that the true question is, what was the effect and meaning of the resolution? Did it mean that the dividend should be payable to those who held the stock on the 15th of February, or to those who should hold it on 1st of April? If the resolution had been clear and explicit in either sense, I conceive there could be no room for a controversy. Being of uncertain meaning, the courts have to give it a certain one. But whatever shall be determined to be its meaning in law, that must be taken to be as plainly its meaning as if it had been expressly written so.

Now as to the meaning and effect of the resolution. In the absence of a plain reason and of direct authority, a lawyer has but one resource. He must refer to analogous cases, and endeavor to extract from them a principle broad enough to cover the case in hand. And he will be more or less successful, according to the number and closeness of the analogies he is able to adduce.

As to the analogies. It is a familiar maxim, that the incident passes with its principal.

If a bond not negotiable, and bearing interest, whether that interest be made payable with the principal at a certain time, or be made payable annually or at other certain times before the principal, be assigned, the assignee is entitled to receive, as an incident, all interest not paid before the assignment, whether the day for its

Burroughs v. The North Carolina Railroad Company.

payment has arrived or not. Of course this doctrine will not apply to bonds with interest coupons detachable.

The analogy is not close in this, because, if a payment of interest had become due and payable on the 16th of February, and the bond was assigned on the 17th of February, the assignment of the bond would have carried the interest previously payable; which, if the analogy were strictly followed, would lead us to hold that if the assignment of stock had been after 1st April, it would have carried the dividend payable on that day, if not paid before the assignment, a conclusion not necessary in this case, and as to which we express no opinion. If one assigns a bond or promissory note, secured by mortgage or other collateral, the benefit of the collateral passes as an incident.

I take it to be clear also, that if a registered government bond be assigned on the books of the treasury, any annual or semi-annual payment of interest, which becomes due and payable the next day, would be paid to the then holder. *Anson v. Towgood*, 1 Jac. & Walk. 637. In such case the dividend would, in substance, have been declared before the assignment, viz.: at the making of the bond, but payable afterward. If a reversioner sell land, the purchaser becomes entitled to the rent which becomes payable the next day. So if tenant for life dies, the remainderman becomes entitled. So with fines and heriots. These analogies, and some others, are found stated in the argument of Sir SAMUEL ROMILLY, in *Paris v. Paris*, 10 Ves. 186. These are all the analogies which occur to me, that are indisputable; for if an analogy be disputable it has no value. They would not be conclusive if any could be brought on the other side. But the general principle is clear, that the incident follows the principal. What reason exists for making this an exception? The burden of the argument is put on the plaintiffs.

What arguments can be drawn from the terms of the resolution?

What was the object in declaring the transfer books of the company closed from 1st of March to 1st of April?

If the dividend was intended to be payable to any one who was the holder on the 16th of February, there could be no use in closing the books. In any case, upon a demand for payment, it would only be necessary to see from the books, who was the holder on that day. But if the usage be, to put the dividend on the books of the company to the credit of the holders on 1st of March, we can see a reason for closing the books, viz.: to give time for the company to

Burroughs v. The North Carolina Railroad Company.

make out its accounts with its stockholders on that day. Suppose an assignment of stock between 1st of March and 1st of April, would the company be bound to notice it, in reference to a dividend payable 1st of April? I think not.

The same rule, which applies to the dividend payable 1st of April, applies to that payable 1st of July. If the first did not pass by the assignment, the second did not.

But the learned counsel were mistaken in supposing the question entirely barren of authority. In such cases we are generally willing to confide in the diligence of counsel, and do not feel ourselves bound to assiduous research. I have found one decided case however, which, if correctly cited, is in point and decisive of this case. I cite it from Lindley on Partnership, 896, as follows: "The specific legatee (of stock) is entitled to all dividends which *become payable* after the death of the testator; *Jacques v. Chambers*, 2 Coll. 435; *Wright v. Warren*, 4 Deg. & S. 367; *even though the resolution authorizing their payment may have been passed in his life-time; Olive v. Clive*, Kay. 600." Unfortunately the last case cited is not accessible to us.

Besides the above, the cases of *Witts v. Stearne*, 10 Ves. 185, 290; *Paris v. Paris*, 13 id. 363, and *Barclay v. Wainewright*, 14 id. 70, and also the American cases, *Phelps v. Farmers' Bank*, 26 Conn. 272; *Minot v. Paine*, 99 Mass. 106; *Goodwin v. Hardy*, 57 Me. 143, may be referred to. These all relate to the right of a tenant for life to dividends both declared and payable in his lifetime. So, none of them are in point to the present question. But in the discussions it seems to be generally assumed that the ownership of the stock, when the dividend became payable, fixed the right to it. As in the case of rent, it is only when it becomes payable, that the dividend becomes "fruit fallen," and detached from the principal estate, so as not to pass with it.

Judgment reversed, and judgment for defendant in this court.

Judgment reversed.

BLOUNT V. WINDLEY.

(88 N. C. L.)

Payment — of note to bank with bills of bank.

The maker of a note due a bank has the right to tender in payment of such note, as equivalent to gold and silver coin, the bills issued by the bank.

A bank cannot, by assignment of its effects, choses in action, etc., deprive a maker of a note due the bank of his right to pay the same with the bills of the bank; nor can the bank, by any authority derived from the legislature, deprive the maker of such right of payment of a note due the bank, in bills of the bank.

CIVIL ACTION determined by WATTS, J., at the spring term, 1872, of the superior court of Beaufort county, upon the following case agreed.

At the fall term, 1866, of the court of equity for Beaufort county, upon the petition of the stockholders of the Bank of Washington, there was a decree of that court, vesting all the real and personal property and choses in action of the Bank of Washington in the plaintiff, as commissioner, pursuant to the act of the general assembly, ratified March 12, 1866, for the benefit of such of the creditors of said bank as proved their debts within twelve months. The notices and advertisements required by the act were complied with.

At the fall term, 1867, of the Beaufort superior court, plaintiff obtained judgment against one A. T. Reddett, and the defendant, who was his surety on a note for \$1,735.50, payable to the cashier of the bank for money borrowed, with interest from the 1st November, 1867, and for costs and execution, was duly issued thereon, returnable to fall term, 1868. Subsequent to the issuing of this execution the defendant Windley obtained bills of the Bank of Washington sufficient to cover the debt, and tendered them to plaintiff in payment thereof, which were refused. He then deposited said bills with the clerk of the superior court of Beaufort county, who received them, not in payment of the judgment, but subject to the order of the court in the case.

At the fall term, 1868, there was a motion in the cause to set aside the judgment, which motion remained pending until the spring term, 1872, and then on the hearing was refused.

Blount v. Windley.

At the spring term, 1872, there was a motion on behalf of the defendant to have the bank bills of the Bank of Washington, theretofore deposited with the clerk of the court, received in payment of the judgment against the defendant, and the same declared satisfied, which motion was allowed by his honor, who directed the clerk of the court to receive said bills of the Bank of Washington as a payment of the judgment against the defendant, and to enter satisfaction of the judgment of record. From this order the plaintiff appealed.

Mr. Haywood, for appellant.

Phillips & Merrimon, contra.

PEARSON, C. J. In *Bank of Charlotte v. Hart et al.*, 67 N. C. 264, the right of the defendant to have "the bills of the bank" applied in payment of a judgment in favor of the bank is conceded, and the only question was as to the allowance of interest upon the bills from the time at which the defendant had demanded to have the bills received in satisfaction of the judgment. It is decided that interest should be allowed. In *Exchange Bank of Columbia and C. H. Baldwin v. Tiddy*, 67 N. C. 169, the principal question was as to the right of the defendant to have "the bills of the bank" applied in satisfaction of the judgment. It is decided "on payment of the bills into court satisfaction of the judgment be entered of record." No notice is taken of the effect of making Baldwin a party plaintiff as receiver, and the case is made to turn on the point, that as against a bank, chartered in another State, suing citizens of this State in the courts of this State, the defendant is entitled to have the bills of such bank applied in satisfaction of the judgment. So between the bank and its debtors, the question may be considered to be settled. In our case the action is in the name of Blount, who is the assignee of the bank, and the point made is, that the defendant has not the right to have the bills of the bank applied in payment as against the assignee. In *Mann v. Blount*, 65 N. C. 99, an opinion is intimated by the court that the defendant is entitled to the same right as against the assignee, that he would have had against the bank, had the note not been assigned. But it was not necessary to decide the point, as the matter went off upon an objection to the mode of procedure, and although the subject was then discussed,

we were willing to hear further argument, treating it as an open question.

The assignment of the note by the bank to Blount is not made by indorsement, as provided by the Statute of Ann, "in like manner as inland bills of exchange, according to the custom of merchants of England." Revised Code, chap. 13, § 1. But, as we will assume for the sake of the argument, by a general deed of assignment, conveying all of the effects, choses in action, etc., of the bank to Blount, in trust for the creditors of the bank, *pro rata*, who elect to take under the deed. So, the learning in respect to the legal effect of the indorsement of a bill of exchange or promissory note, according to the custom of merchants in England, before maturity or after maturity, has no application to our case; and we will not enter into a consideration of the point, whether the indorsee of a note, before maturity, made to a bank, has a right to compel payment in gold or silver coin, and is relieved from the right of the maker to pay the note in the bills of the bank, which right he certainly had, as against the bank; or whether the indorsee, after maturity of a note made to a bank, has a right to compel payment in gold and silver coin, or is subject to the right of the maker to use the bills of the bank in discharge of the note, as a right which had attached at the date of the indorsement; for, in either case, if the maker has not the same right as against the indorsee, that he would have had against the bank, it results from the effect given to the indorsement "by the custom of merchants in England," with which we are not now concerned.

Nor will we enter into a consideration of the point in respect to the law of set-off, whether the defendant must hold the "mutual demand" at the time of the assignment or at the commencement of the action, or at the time of plea pleaded, or at the trial; for ours is not a question of set-off, but a question as to the right of a bill-holder to use the bills of the bank as a legal tender, equivalent to gold and silver coin, *in satisfaction of a debt due to the bank*.

The neglect of advertence to those diversities is the cause, as it seems to us, of the obscurity and confusion in which the question is involved in many of the cases. See *Exchange Bank of Virginia, for Camp, Trustee, v. Knox*, 19 Gratt. 739; 3 Wend. 13; 8 Watts & Serg. 311; 1 Ohio, 381. It certainly is the main fallacy of the very labored argument of the plaintiff's counsel in this case.

Nor will we enter into a consideration of the point, how the

Blount v. Windley.

question would have been had the payee of the note been an individual or a corporation *other than a bank, chartered for the purpose of supplying a currency in the shape of bills of the bank, to circulate as the representative of money.* For here the payee is such a bank.

The question will be considered in four points of view :

1st. Did the maker of the note have a right to tender *the bills of the bank* in payment, as equivalent to gold and silver coin, or had the bank a right to compel payment in gold or silver coin, and to refuse to accept its own bills in payment of debts due to it ?

This is too plain for discussion. The object of incorporating the bank was to furnish *a currency*, and as a condition for the grant of this franchise, or exclusive privilege, the law "tacitly" annexed the condition (using the words of Lord COKE), that the bank would receive its own bills in payment of debts due to it.

So, when the note was made, there was this condition implied by law, *as a part of the contract*, just as forcible as if set out in the face of the note, "the bills of the bank will be accepted in satisfaction of this note, as equivalent to gold and silver coin;" and carrying out the idea, as if every ten dollar bill had been stamped, "equal to \$10, in gold, in payment of debts due to the bank." Assuming this to be so, it is said, "tender of money must be pleaded, and the money be brought into court, which, of course, must be done before judgment."

Here we have another instance of the confusion of ideas by the introduction of irrelevant learning. The defendant does not propose to avail himself of a right common to every defendant, when there is a controversy as to the amount due, to tender money and bring it into court. He takes the broad ground of a right, as a part of the contract, to pay this debt in the bills of the bank, and that the bank has its mouth shut by estoppel, and by the maxim, "no one shall take advantage of his own wrong." So it can make no difference whether the bills of the bank, which are, as against the bank, to be treated as equivalent to gold and silver coin, are tendered before or after judgment. Surely a debtor can discharge his debt, by a tender of gold and silver coin, at any time before the sheriff sells under execution. As against the bank, the bills of the bank are to be treated as equivalent to gold and silver coin. At the common law, when execution had not issued within a year and a day, the plaintiff was required to issue a *sci. fa.*, to give the defendant a day in court, to show cause; if an execution issued within the

year and a day, the defendant, in order to get a day in court, sued out a writ of *audita querela*, and in either case, as good cause why execution should not issue or should be superseded, and satisfaction be entered of record, it was enough to show, that he had tendered the amount of the judgment in gold and silver coin, or its equivalent. In *Exchange Bank of Columbia v. Tiddy*, the application of the bills of the bank was allowed at the time when the judgment was entered. In *Bank of Charlotte v. Hart*, the application was allowed after the judgment had been rendered. In neither case was it suggested that the act of 1869 violated the constitutional provision, as to "legal tender," for the plain reason that *the bills of the bank* are made a legal tender by the act of the parties, as a part of their contract, and as a necessary incident to an undertaking, to supply a circulation to pass as money. The legislation on the subject was treated as declaratory, and in affirmance of the right of the defendant to have the bills of the bank applied in satisfaction, and to provide a mode of procedure.

2. Did the bank, by its own act, have the power to deprive the maker of the note of this right, and by a general assignment of its effects, choses in action, etc., to the plaintiff, in trust for such of its creditors as should elect to claim under the deed, to put it in the power of the trustee, or assignee, or commissioner, to compel the maker of the note to pay in gold and silver coin, instead of the bills of the bank? A statement of the proposition would seem to be sufficient for its solution, if the idea of the indorsement of negotiable paper according to the law merchant, and the doctrine of set-off, which, as we have seen, has nothing to do with the question, be kept out of view. It takes two to make a bargain, and it takes two to rescind it. The bargain was, that the bank would receive its bill in payment of the debt. The defendant is ready to comply with his contract, and has never agreed to forego this right. Why shall he not use it against the assignee, in the same way that he could have used it against the bank, had there been no assignment? That is the question.

We assume that the bank has executed a general deed of assignment in trust for creditors, which is the most favorable view for the plaintiff, and such we will suppose to be the legal effect of the decree of the court of equity, set out in the case, in connection with the act of 12th March, 1866, under which the bank went into liquidation. Suppose, then, that the bank had executed a general

Blount v. Windley.

deed of assignment, in trust for creditors, to be paid *pro rata*, what is the effect of the assignment? To vest in the plaintiff all of the rights of the bank for the benefit of such creditors as may elect to claim under the deed; but how can that affect or impair the rights of billholders, who did not concur in the arrangement, or the rights of debtors of the bank, to pay debts due to the bank, in its bills as equivalent to gold and silver coin? In other words, on what principle of law or equity can the assignee or the creditors be put on higher ground than the bank occupied in respect to the right of the debtors of the bank to tender its bills in satisfaction of debts due to the bank?

The indorser of a negotiable instrument before maturity stands on higher ground than the payer, by the law merchant, but that has no application to a deed of assignment in trust for creditors. A purchaser for valuable consideration without notice, who takes a deed from a trustee, passing the legal title, is not subject to the trust, and stands on higher ground than the trustee, by the rule in equity, "when equities are equal the legal title prevails;" but that doctrine has no application to a deed of trust for the benefit of creditors, for two reasons: 1st. The legal title in choses in action does not pass, so the rights and equities stand as before; 2d. Neither the trustee nor the creditors are purchasers for valuable consideration, within the meaning of the rule. The trustee pays nothing. The creditors pay nothing, nor do they surrender any right; they merely concur in an arrangement, by which they hope to secure some portion of their debts. The idea of a "purchaser," who pays nothing in money, or in money's worth, is absurd. The fact is, that all that has heretofore been claimed, or conceded to assignees in trust for creditors, is, that the deeds of assignment should not be deemed and held to be voluntary and fraudulent under the statute 13 Elizabeth, as against creditors. After much hesitation, in opposition to the ruling of the courts in England, it was held that the *bona fides* of the creditors, secured by the deed of trust, relieved it from the imputation of being voluntary or fraudulent, as against creditors; and in that sense the deed was to be treated as made for valuable consideration and not void as a fraudulent arrangement; but the notion that the trustee or the creditors could occupy the ground of being purchasers for valuable consideration, without notice, entitled to stand on higher ground than the maker of the deed of trust, is novel, and we should say is absurd, were we

not forbidden by the respect due to the decisions of some of our sister States, cited on the argument. *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463; *Wallenger v. Coultts*, 3 Minn. 707.

By confounding the distinction between deeds, which will not be treated as voluntary, and for that reason fraudulent and void as against creditors, under 13th Elizabeth, and deeds to purchasers for valuable consideration, in fact paid, without notice of a trust, a plausible argument is made in support of the position, that the assignee or trustee, and the creditors claiming under the deed, are entitled to a higher position than the bank could have occupied. Our opinion is, that the assignee and creditors stand "in the shoes of the bank." The position, that, by the effect of the deed of assignment, the debt ceased to be a debt due to the bank to be satisfied by "the bills of the bank," and became a debt due to the creditors of the bank, exempt from that right, is a conclusion illogical and unsatisfactory.

3d. Could the bank, by the aid and concurrence of the general assembly, deprive the maker of this right, by a transfer of the note, going into liquidation and surrendering its charter? "No State can impair the obligation of a contract." When this contract was made, a part of it was, that the maker had the right to pay the note in the bills of the bank; he has never forfeited that right. How, then, can the general assembly and the bank, by any kind of combination and confederacy, alter the contract, and force the maker to pay in gold and silver coin, when he is ready, able and willing to pay in the bills of the bank? You say he did not pay when the note fell due, but he is willing to pay the interest; and has it ever before been heard of, that, because a debtor does not pay at the day, that gives the general assembly power to alter the contract and strike out one important part of it, even although the bank has been unfortunate and is compelled to go into liquidation, and is earnestly desirous to divide its funds, as far as they will go, among its billholders and its depositors, all being honest creditors? Can the misfortunes or the shortcomings of the bank put it in the power of the general assembly to alter the contract of the defendant, and take from him "a vested right?" If requested to consent to divide the loss with another class of creditors, he says, when I incurred the debt, it was a part of the contract, that I was to be at liberty to pay it in the bills of the bank; you deposited your money solely on the faith you had in the bank, knowing that all of

Blount v. Windley.

its debtors had a right to pay debts in its bills ; at all events, I feel at liberty to stand upon my rights, under the contract, and the bank cannot, by its own action, or with the aid and concurrence of the general assembly, alter the contract.

4th. Has the general assembly concurred with the bank in this attempt to deprive the defendant of his right to pay the debt in the bills of the bank ? So far from doing so, the act of 1st March, 1866, and the ordinance of the convention, 22d June, 1866, both being before the bank made its transfer, expressly reserved the right of the debtors of banks to pay in the bills of the bank ; and the act of 12th March, 1866, under which the Bank of Washington went into liquidation, must be construed, in reference to the act passed only two days before, as is declared and affirmed by the ordinance of 23d June, 1866, with notice of which the bank made the transfer ; and as is also declared and affirmed by the acts of 12th March and 17th December, 1869, and 4th March, 1871, all of which declaratory acts show that it was not the intention of the general assembly to continue and co-operate with the bank, to aid it in an attempt to deprive the defendant of his right to pay off his note in the bills of the bank ; on the contrary, these latter acts are so strong that the argument for the plaintiff is bound to get rid of them, by asserting that they are unconstitutional, as impairing rights acquired under the transfer of the bank.

No one can read the legislation upon the subject, without being convinced that the general assembly, so far from intending to deprive the holders of bills of banks of the right to use them in payment of debts due to the bank, there is a constant and earnest endeavor to preserve that right, and to provide ways for its exercise, as well as before judgment.

No error.

Justice BOYDEN dissented.

Judgment affirmed.

BOYLSTON INSURANCE CO. V. DAVIS.

(68 N. C. 17.)

Tenants in common — attachment.

Where A enters into an agreement with B to save from a wrecked vessel as much of the cargo as could be saved, and B agrees to allow him, for his services, such a per cent of the property saved, as compensation; and in pursuance of such agreement, A recovers from the wreck a portion of the cargo and lands it on the beach in a place of safety; *held*, that A and B are tenants in common of the property so saved, and that the undivided share of A is liable to be seized by the sheriff under a warrant of attachment.

ACTION for the recovery of certain iron saved from the wreck of the ship "Pontiac."

The plaintiffs, Marine Insurance Companies, claimed title to the property sought to be recovered, by virtue of the following agreement entered into by their duly accredited agents, B. L. Perry and E. H. Faucon, that is to say :

"It is agreed between B. L. Perry and E. H. Faucon, parties of the first part, and John Lewis, of the second part, that the said Lewis is to use all his means and skill necessary, and that he is possessed of, or can procure, to get from the wreck of the late ship "Pontiac," now under water, off and near the Core banks, or beach, all the property of whatever description, or so much of it as he can possibly, at any time, succeed in obtaining, and land it in the store or freight-house at Morehead City.

"It being understood and agreed that the said Lewis is to receive three-quarters, or seventy-five per cent of the whole, and the said Perry and Faucon the remaining one-quarter, or twenty-five per cent, and is to go into the possession of said Perry, one of the parties of the first part, and resident in Beaufort, N. C.; and the division of the property recovered is to be made in the presence of ———, with the consent of the said Perry; and in case of his sickness or otherwise unable to act, then the said Perry shall appoint some one to act in his place, and to give his receipt for the property so received, and with a description and memorandum of it.

Boylston Insurance Co. v. Davis.

"And the said Lewis, of the second part, engages to use his best diligence in working at the above-named property, whenever the condition of the weather and sea permit him to do so. And it is also agreed that if said Lewis, of the second part, choose to receive his three-quarters here, as it may be brought in and divided, or to let it go forward undivided to a market, which will be the port of Boston, Mass., with the other quarter, he shall be allowed to do so — he, the said Lewis, of the second part, paying his proportion of duties and all the other expenses that may accrue in forwarding the property north and the finally disposing of it. Said Lewis to draw at sight for whatever he may be entitled to, on being notified of the closing of any account of sales.

"BEAUFORT, N. C., *March 6, 1871.*"

(Signed by Perry & Faucon, agents, and Lewis.)

In pursuance of the agreement, Lewis raised a quantity of iron from the wreck, and placed it on the beach. Before the iron was removed from the beach, and a short time after it was taken from the wreck, an attachment was issued at the instance of one Martha Lambert, from the superior court of Carteret county, against said Lewis, and placed in the hands of the present defendant, sheriff of said county.

At the January term, 1872, of the court, judgment was rendered in favor of the plaintiff in the attachment, upon which execution issued, commanding the iron to be sold, etc. Before this execution came to the hands of the defendants, the plaintiffs commenced this action, claiming the iron, and giving the necessary undertaking, took the same into possession.

On the trial, the jury rendered a verdict in favor of the plaintiffs; and a judgment condemning the property to the use of the plaintiffs, was entered up by the court; from which judgment the defendant appealed.

J. H. Haughton and Hubbard, for appellant.

Green, for plaintiffs.

RODMAN, J. The main question is, did Lewis, by virtue of his contract with the plaintiffs, acquire a property as a co-tenant with them, in the iron saved by him, which was liable to levy under execution against him? We think he did. It depends altogether

on the intent and meaning of the written contract. It was contended that this did not amount to a sale of an undivided share of the iron, as, and when it was recovered and put in a place of safety, but that it was merely executory until the iron should be carried to Morehead and divided in the presence of Perry.

To seek for the meaning of the parties in a contract not accurately or technically drawn, by considering particular words or phrases in it, which incline more or less to either one side or the other, though in some cases necessary, rarely gives a clear and satisfactory result. It is in general safer to draw a conclusion from the circumstances of the contracting parties and the general provisions of the instrument. If, in this case, the plaintiffs had agreed to pay Lewis a certain sum per ton of iron saved, he would, in the absence of a contrary agreement, have had a lien upon the iron for the sum earned. The actual agreement was, that he should have an undivided share in lieu of a certain sum and a lien. But this share could not be a security in the nature of a lien, unless the property in the share passed to him at once. The provisions for the iron being carried to Morehead and there divided, or sent to Boston for sale, at the pleasure of Lewis, are not conditions precedent to the vesting of the property, but merely provisions for its division, and directing its disposition after it should have become common property. We consider that Lewis was a tenant in common with the plaintiffs in the iron, while it laid on Core beach. Now, it is settled law, that a sheriff may sell under execution the undivided share of a tenant in common in goods, and for that purpose he may seize the whole. *Blevins v. Baker*, 11 Ired. 291. His right is the same as respects the seizure, and as far as concerns this question, under an attachment, as it would be under final process. In the case cited, the officer divided the common property and sold only the share of the defendant in execution. In England it is held that a sheriff, under an execution against one partner, may seize all the goods of the partnership, and may sell the interest of the insolvent partner in them, to be ascertained on the taking of the partnership account, but that he ought not to deliver the goods to the purchaser, so as to exclude the possession of the solvent partners. *Lindley on Partnership*, 584. How this may be in North Carolina, and whether the same rule would apply to the case of goods held in common, but not in partnership, it is unnecessary to inquire.

Adams v. Reeves.

It is equally well settled that a sheriff who seizes goods under execution acquires the property of the defendant in the execution in them. The defendant thus becomes *pro hac vice* a tenant in common with the plaintiff. It is also settled, that one tenant in common cannot maintain any action to recover the possession of the common goods from his co-tenant. Each is equally entitled to the possession of the whole. *Powell v. Hill*, 64 N. C. 169.

The judgment below is reversed, and as the plaintiffs have obtained possession, the case is remanded to that court, in order that a judgment may be given there, in conformity to this opinion, and that such further proceedings be had as the law requires. The defendant will recover his costs in this court.

Let this opinion be certified.

Judgment reversed.

ADAMS V. REEVES.

(68 N. C. 124.)

Mistake—payment under

A voluntary payment, with a knowledge of all the facts, cannot be recovered back, although there was no debt; a payment, under a mistake of fact, may. If one, knowing that he has no claim upon another, sues out legal process against him and seizes his person or property, and the defendant, acting upon the false representations of the plaintiff, and not being able at the time, by reasonable diligence, to know or to prove that such representations are false pays the demand, he may recover it back in a subsequent action.

CIVIL ACTION tried before CLOUD, J., at spring term, 1872, of the superior court of Forsyth county.

The action is brought to recover money which the plaintiff alleges he paid to defendants through their fraudulent representation, and paid under the compulsory process of law. On the trial, certain issues were submitted to the jury, to wit:

1. Was J. H. Richards the agent of the defendants in the sale of the tobacco mentioned in the pleadings?
2. Did the defendants or either of them induce the plaintiff, by false representation, to pay defendants any money, the proceeds of the sale of the tobacco?

3. What is the amount of the plaintiff's damage, if any?

Richards, the alleged agent, in relation to his agency, among other things, testified : That in a conversation he had with R. E. Reeves, one of the defendants, at Dobson, in the summer or fall of 1871, he asked Reeves, "Do you deny that I was your agent to buy and sell tobacco for your firm?" That Reeves answered : "No, I will admit it before any court or jury." Again he asked him : "Did you deny that you employed me, as your agent, to sell the tobacco sold by me to Adams (the plaintiff) as my own, and to do the best I could with it?" To which Reeves replied, "I have never denied it;" that the conversation took place in the presence of one White. White, being examined on the trial, corroborated Richards, and further testified, that he knew Reeves and that Reeves knew him, had conversations with him, etc.

R. E. Reeves, the defendant, in regard to this conversation, testified that he had a conversation with Richards at the time and place, giving a different version of it, and denying the truth of Richards' statement; but that no such man as White was present, that he did not know him, nor had he ever seen him until the day before the trial, when he was pointed out to him as being one of the witnesses. On his cross-examination, Reeves was asked if he had not seen White with one Bass at his own house (Reeves') last Christmas; and did he not at that time offer to purchase White's crop of tobacco. Reeves recollected seeing Bass there about that time, but had no recollection whatever of White, or his offering to buy tobacco from him; nor did he ever see him at other times.

In reply to Reeves, White was recalled, and asked about being at Reeves' house, etc. Defendants objected to this question. Objection overruled. White stated that Bass and he were at the house of Reeves last Christmas; that Reeves knew him, called him by name, and offered to buy his tobacco. Bass, being examined, sustained White.

It was further proved on the part of the plaintiff, that Reeves told him, the plaintiff, that Richards was not his agent, nor had any authority to sell the tobacco, nor had he any control of it. That Richards was a great scamp, and was only permitted by the firm to go along with their wagon, to visit his relations in Virginia; that Richards had practiced a fraud upon the plaintiff and himself, and offered to assist the plaintiff in bringing Richards to justice.

For the defendants, it was further proved, that they had brought

Adams v. Reeves.

suit against the plaintiff in Danville, Va., and had attached some funds of his, the plaintiff's, which were in bank; that this suit was compromised by the plaintiff's paying the amount to defendants for the tobacco sold by Richards. The defendants insisted that the money was paid upon a compromise of that suit, and not by reason of any misrepresentation.

There was other evidence introduced, which is not material to the points involved. The instructions asked by the parties, and those given by his honor, are fully set out in the opinion of the court.

The jury returned a verdict for the plaintiff. Rule for a new trial; rule discharged. Judgment and appeal by defendants.

Scales & Scales, for appellants.

Blackmer & McCorkle and *Masten*, contra.

RODMAN, J. A voluntary payment, with a knowledge of all the facts, cannot be recovered back, although there was no debt. But a payment under a mistake of fact may be. *Pool v. Allen*, 7 Ired. 120; *Newell v. March*, 8 id. 441; *White v. Green*, 5 Jones, 47; *Marriot v. Hampton*, 2 Smith's L. C. 237, and notes.

And this is not the less true if the mistake as to the fact, was caused by the false representation of the defendant: provided, the plaintiff could not, by reasonable diligence, under the circumstances, have informed himself of the truth. It is on this principle that the plaintiff puts his right to recover in this case.

It is said, however, for the defendants, that money paid under compulsion of legal process cannot be recovered back, and for this is cited *Marriot v. Hampton*, *ubi sup.*, and other cases which have followed in its track. In that case the defendant had recovered judgment against the plaintiff for a sum which plaintiff alleged he had paid, but he was unable to produce any evidence of the payment, and paid the demand, at what stage of the action does not appear; afterward he found the defendant's receipt, and brought his action to recover back the money.

It was held, on the principle that there must be an end of litigation, that the plaintiff could not recover. The decision has been repeatedly followed, and it is settled law as a general rule, that if one compromises a demand after action brought, by paying it in

whole or in part, he cannot, in a subsequent action, recover back the money paid, upon any ground of which he might have availed himself as a defense to the original action. But this rule is subject to the qualifications: 1. That the process was *bona fide* sued out, and was not accompanied by circumstances which amounted to duress or extortion. 2. That the debt demanded was not false to the knowledge of the plaintiff. Probably the two qualifications are in substance the same; but for the present purpose, the division is convenient.

In the present case, the fact which is an essential part of the plaintiff's case, viz.: that Richards was the authorized agent of the defendants to sell the tobacco, would, with other facts which do not seem to be disputed, have been a complete defense in the original action.

There was no evidence of actual duress or oppression. The mere facts that the original action was begun by an attachment of property, or that property was attached in the course of it; or, that it was brought in a neighbor, though foreign, State, do not of themselves constitute or imply duress. We must assume that the plaintiff, although a resident of North Carolina, would have received in the courts of Virginia the same justice that he would have received in his own State. These matters are mentioned only to be put out of the way as not affecting the case. It remains only to consider whether the second qualification of the rule above stated can be supported in law, and whether it is applicable in the present case; and in that connection the fact of the attachment of the plaintiff's property may be considered.

The principles stated above in the shape of a qualification to a general rule may be stated as an affirmative proposition, thus: If one, knowing that he has no claim upon another, sues out legal process against him and seizes his person or property, and the defendant, acting upon the false representation of the plaintiff, and not being able at the time by reasonable diligence to know or to prove that such representations are false, pays the demand, he may recover it back in a subsequent action.

As to authority, in nearly every case in which the general rule is laid down, it is coupled with the qualification—if there be no fraud. Notes to *Marriot v. Hampton*; *Hamlet v. Richardson*, 9 Bing. 644; *Milnes v. Duncan*, 6 B. & C. 679; *Tartwell v. Horton*, 28 W. (2 Williams) 370.

As an affirmative proposition, the cases illustrating it are clear and numerous. The leading one is *Cadaval v. Collins*, 4 A. & E. 858 (31 E. C. L. R.). There the plaintiff, a Spaniard, ignorant of the English language, was arrested in England at the instance of the defendant for a fictitious debt of a large amount, and to procure his liberation paid the defendant £500. Afterward he brought an action to recover it back. The jury found that the defendant knew that his claim was false, and the plaintiff was held entitled to judgment. PATTERSON, J., says: "I admit in general that money paid under compulsion of law cannot be recovered back as money had and received. And further, where there is *bona fides*, and the money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back. But here there are no *bona fides*, and on that I ground my opinion. When a man sues to recover back money paid under compulsion of law, it lies upon him to show that there was fraud. Has the plaintiff shown that here?" After briefly stating the facts, he says: "To say that money obtained by such extortion cannot be recovered back would be monstrous." Applying the same doctrine to various conditions of fact are the following cases: *Pitt v. Combes*, 2 Ad. & El. 459; *Atter v. Backhouse*, 3 M. & W. 633; *Unwin v. Leaper*, 1 M. & Gr. 752; *Wilson v. Ray*, 10 A. & E. 82; *Wakefield v. Newton*, 6 Q. B. 280; *Oates v. Hudson*, 6 Exch. 343; *Rheel v. Hicks*, 25 N. Y. (11 Smith) 289; *Tartwell v. Horton*, 2 Wms. (28 W.) 379; *Gardner v. Mayor of Troy*, 26 Barb. 423; *Sheldon v. School District*, 24 Conn. 88.

These principles would be applicable to the case which the plaintiff has set up in his complaint, and which he claims to be established by the finding of the jury. We have then to inquire if such a case has been established, and if the jury were properly instructed as to the bearing of the evidence upon the issues. The defendants except to the instructions for error.

The only fact that seems to have been really disputed between the parties is, as respects the authority of Richards to sell the tobacco, *when and where he did*, viz.: on his way to Danville and before his arrival there. This question is not presented with much precision in the first issue, although it may be held sufficient. The judge, in his first instructions, leaves the question to the jury in the general language of the issue. He tells them "that they must be satisfied from the evidence that Richards was the agent of defend-

ants, and as such authorized to sell the tobacco," meaning of course at the time and place of the actual sale. So far there is nothing erroneous or objectionable in the judge's instructions, and if the jury had thereupon found for the plaintiff we should not have felt bound to disturb their verdict. Afterward, however, the judge, at the request of the plaintiff, instructed the jury as follows: "If the evidence satisfies the jury that the defendants employed Richards to go with their tobacco as their agent, and to carry the same to Pace's warehouse in Danville, Va., and authorized him to sell the same as his own, and to do the best he could with it, then the defendants would be bound by the sale made by Richards to Adams, although the contract was made at Reidsville, when Richards was on his way to Danville."

These instructions are so lacking in precision that it is difficult to put any certain construction on them. If they mean (as they may) merely that the jury, in passing on the authority of Richards to sell at Reidsville, might consider not only the direction to him to go to Danville, but also as qualifying that the direction to sell the tobacco as his own, and to do the best he could, the instructions were right.

But in that sense they would be in substance only a repetition of what the judge had just before said. We think, therefore, that we must understand them as meaning and intending to convey to the jury the idea, that if Richards was ordered to carry the tobacco to Danville and sell it *there*, yet by force of the other directions to sell it as his own, etc., he had, *as a conclusion of law*, authority to sell at Reidsville; we do not think that is a *legal* inference upon which the judge could authoritatively instruct the jury. The words, taken either by themselves or in connection with the circumstances, may bear that meaning. But they do not necessarily or plainly do so. And although generally the meaning of words in a contract, whether written or oral, is for the court, yet, when the proof of words is not clear and their meaning is uncertain, and may be affected by the attending circumstances, it must necessarily be left to the jury to find it. *Islay v. Stewart*, 4 Dev. & Bat. 160; *Young v. Jeffries*, id. 216; *Horton v. Green*, 66 N. C. 596.

In such a case the contract of the parties becomes a mixed question of fact and law in which it is impossible to separate the elements.

With some hesitation we are of opinion that these instructions

State v. Branch.

may naturally have misled the jury in their finding on the first issue. We are the more disposed to this conclusion because they were given in the words requested by plaintiff, and if a party prays special instructions, it is his duty to make them plain and precise; and if they are vague and obscure, and may as fairly be understood in a sense which would make them erroneous, as in one which would make them proper, that construction must be adopted which is against the party.

Venire de novo.

STATE V. BRANCH.

(88 N. C. 186.)

Indictment — grand jury.

A judge of the superior court has no right to require a grand jury to have the witnesses on the part of the State examined publicly.

CRIMINAL ACTION certified to this court in obedience to a writ of *certiorari*, issued upon the petition of the defendant.

The facts pertinent to the only question decided in this court, as alleged in the defendant's petition for a *certiorari*, and contained in the "case stated," filed by his honor, and sent up with the transcript of the record, are substantially:

That at the spring term, 1872, of Halifax superior court, an indictment charging the defendant with having committed an affray, and with an assault on one Spier Whitaker, was sent by the solicitor to the grand jury; that the said Whitaker and one Hardy were the witnesses sent to, and examined by the grand jury, who, after the examination, "offered to return the bill," indorsed, "not a true bill," which the court refused to receive. His honor ordered the grand jury to be seated in the jury-box, and proceeded to examine in open court before them (the grand jury) Hardy and Whitaker. Upon the evidence of these witnesses his honor charged the grand jury, that if the testimony was believed, it was their duty to find a true bill; and that after this charge from the court, the grand jury returned the bill indorsed, "a true bill."

State v. Branch.

The defendant moved to quash the bill of indictment, assigning as ground for such motion the facts above stated. His honor refused the motion, and required the defendant to plead. From this order the defendant prayed an appeal to the supreme court. The court refused to allow the appeal.

Conigland and Batchelor & Son, for petitioner.

Hargrove, attorney-general, and *Cox*, contra.

PEARSON, C. J. We will pass by the objection made to the mode of instituting this proceeding, and also the point that the announcement of their finding by the grand jury is, in contemplation of law, recorded at the instant it is announced, on the principle, that in a civil action the plaintiff cannot take a nonsuit after the jury has announced its verdict, for it is in law recorded *eo instanti*; and the corollary drawn therefrom, that as the bill has been returned "not a true bill," the same bill, nor a bill charging the same offense, cannot be passed on by the same grand jury.

We give no opinion on this corollary, but we can see no objection to the practice, that after an indictment has been returned "not a true bill," the State solicitor, upon a suggestion to the court that he has procured further evidence, may be allowed to send another bill to the same grand jury, charging the same offense.

These points are passed by for the purpose of putting our decision upon the main question, that is to say, has a judge the right to require a grand jury to have the witnesses on the part of the State examined publicly?

There is nothing in our law books, and no tradition of the profession, to show that such has ever been the practice or the course of the courts in this State; and we are of opinion that the ruling of his honor is an innovation not warranted by the law of the land.

The power of the judge to require a grand jury to come into open court and have the witnesses for the State examined, is not only opposed to immemorial usage, but is not sustained either by principle or by authority.

The province of a grand jury is not to try the party, but to inquire whether he ought to be put on trial; and the purpose is, to save the citizen the trouble, expense and the disgrace of being arraigned and tried in public on a criminal charge, unless there be sufficient cause for it. To this end it is provided by the constitu

State v. Branch

tion: "No person shall be put on trial, except upon a bill of indictment found by a grand jury." This provision of the constitution was aimed at a prerogative of the crown, under pretense whereof a citizen could be put on trial upon a charge of a criminal offense, upon the information of the crown officer, whereby the good citizens were oftentimes exposed to the scandal and disgrace of being tried in public, when, in truth, there was no sufficient cause to suspect their guilt.

Thus it is seen that the purpose of this provision in the declaration of rights is to protect citizens from the scandal and disgrace of being arraigned and put on trial in public, unless there be sufficient ground for it.

How does this innovation upon ancient usage comport with this clause of the declaration of rights? It defeats it *in toto*. If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may as well be done on the information of the State's solicitor; for the protection of a grand jury amounts to nothing if the citizen is to be first exposed to scandal and disgrace by a public examination of the witnesses on the part of the State, in order to see whether he ought to be exposed to the scandal and disgrace of being tried in public on a criminal charge; and if, upon the public examination of the witnesses for the State, he has no right to cross-examine, and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right "to confront the accusers and witnesses with other testimony and to have counsel for his defense," instead of being, in the first place, put in the condition of a victim tied to a stake, while his reputation is being tortured to death. If the witnesses for the State are to be examined in public, upon the inquiry of the grand jury, in all fairness the accused should be allowed to cross-examine and to offer witnesses to contradict or explain, and to have the benefit of counsel. So the result would be two trials in public instead of an inquiry and one trial, provided the bill is returned by the grand jury "a true bill." To avoid this absurdity, his honor took the other horn of the dilemma, and refused to allow the accused to cross-examine, and of course to offer witnesses in contradiction, etc., and "tied the victim to the stake." He was subjected to bear the disgrace of whatever the witnesses might swear against him, and could not be heard.

In either point of view this procedure is opposed by the principles of the common law, which means "common sense."

As to authority, the only case cited to support this innovation is that of the *Earl of Shaftesbury*, 8 State Trials, 772. A perusal of that case will satisfy any one that it ought not to be made a precedent, for the reason that it was in the time of Charles II, 1181, when the Duke of York, with the countenance of the king (his brother), had joined the Roman Catholics, and the attempt of the Jesuits to make that "the established religion" was stoutly opposed by the people, and by no others more zealously than the citizens of London, of whom the grand jury was drawn; and who, although compelled to hear the witnesses for the crown examined in public, because "such was the pleasure of the king," were "stout enough" to cross-examine the witness for the crown, and after being charged that it was not their business to pass upon the credit of the witnesses of the crown (that should be left for the jury of trial), had the manhood to refuse to find the bill, and to indorse "*ignoramus*;" for which, as the report says, there was such applause and loud cheering that nothing could be heard, and the judge retired.

This case was never drawn into a precedent in England, and the practice there has ever since been for grand juries in their sessions, which are held in their own room, under an oath, "the State's counsel, your fellows, and your own, you will keep secret," to examine such witnesses as are indorsed on the bill, "sworn and sent," and the return is made, "not a true bill," unless, at the least, twelve of the grand jury would convict upon the evidence before them.

There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever "in force and in use in the colony of North Carolina;" very certainly, such has not been the practice in the State of North Carolina, and it must be rejected as inconsistent with the genius of a republican government. Why examine the witnesses for the State in public, without the right of cross-examination and of confronting the witnesses, unless it be to expose the accused to scandal and disgrace, else to browbeat the grand jury and influence "the finding," not in respect to the case, but in respect to the fact?

There is error. This will be certified.

Judgment accordingly.

State v. Pepper.

STATE V. PEPPER.

(68 N. C. 259.)

Indictment—profane swearing.

To make profane swearing a nuisance, the profanity charged must be uttered in the hearing of divers persons; and it must be charged in the bill of indictment, and proved to have been so uttered. The general allegation *ad commune nocumentum* is insufficient.

Hence, where the indictment is alleged that the defendant "in the public streets of the town of L., with force and arms, and to the great displeasure of Almighty God, and the common nuisance of all good citizens of the State then and there assembled, did for a long time, to wit: for the space of twelve seconds, profanely curse and swear, and take the name of Almighty God in vain, to the common nuisance, etc.:" Held, that no criminal offense was therein charged.

INDICTMENT for a common nuisance. The allegation in the bill of indictment charging the offense is set out in the opinion of this court.

On the trial below the judge charged the jury, that if the defendant went into the streets in the night, and by loud talking and by profane and objectionable language, disturbed and annoyed the citizens generally, that he was guilty; that the question was not whether he disturbed particular persons, but whether his conduct annoyed and disturbed the neighborhood. That the offense was sufficiently set forth, inasmuch as the bill of indictment charged it to have been in the streets of a town, and in the presence or hearing of the inhabitants, and to their nuisance.

The defendant was found guilty. Judgment and appeal.

No counsel for defendant, in this court.

Attorney-General Hargrove, for the State.

RODMAN, J. The attorney-general moved to dismiss the defendant's appeal, because he had neither given an appeal bond or made the affidavit of inability and filed an opinion of counsel in lieu of it, as provided by the act of 1869-'70, chap. 196. He afterward, however, argued the case on its merits, thereby waiving his motion

to dismiss the appeal. He had a right to do this, and we have no disposition, perhaps no right, to revise his discretion. But we may say generally, that inasmuch as it never can be to the interest of the State for one of its citizens to suffer punishment, unless he has been legally charged with and found guilty of some crime, a public prosecutor acts within the spirit of the law, if he forbears to insist on a strict compliance with its terms, when he has reason to believe that a question of reasonable doubt is presented by the record; that the failure to comply was the result of ignorance or accident, and that his forbearance is not likely to prejudice the just claims of the State.

The only question which it is necessary to consider arises on the face of the indictment. Does it charge any criminal offense?

It charges that the defendant, "in the public streets of the town of Lumberton, with force and arms, and to the great displeasure of Almighty God, and the common nuisance of all the good citizens of the State, then and there being assembled, did, for a long time, to wit: for the space of twelve seconds, profanely curse and swear and take the name of Almighty God in vain, to the common nuisance as aforesaid," etc.

We think no indictable offense is charged, and that the indictment is defective in several respects.

1. In the learned and instructive opinion of the court in *State v. Jones*, 9 Ired. 38, delivered by NASH, J., it is said that a single act of profane swearing is not indictable. The acts must be so repeated in public as to have become an annoyance and inconvenience to the public. The fact must be so, and it must be so charged. That is not charged in the bill before us. The question is too clear, both upon reason and authority, to require more to be said.

To make profane swearing a nuisance, the profanity must be uttered in the hearing of divers persons, and it must be charged in the bill to have been so uttered. This principle is fully established by the *State v. Jones*, and the cases there cited, especially *State v. Waller*, 3 Mur. 229, which was an indictment for drunkenness.

In this case the averment that the profanity was, "to the common nuisance of all the good citizens of the State then and there being assembled," is equivocal. Taken literally it would mean that all the citizens of the State were assembled in Lumberton on this occasion; which would be absurd. If it be understood as alleging that the profanity was to the nuisance of all *such* citizens of the State,

State v. Pepper.

as were then and there assembled, it is not a direct and positive averment that any citizens were so assembled. The averment might be true, although there were no persons assembled. It is not the same as saying, "in the presence of divers persons being then and there assembled;" for that contains a direct averment of the presence of divers persons.

We were referred to the *State v. Roper*, 1 Dev. & Bat. 208, as an authority that it was not necessary to charge the act to have been done in the presence of any person; it being charged to have been done in a public place.

In that case the indictment charged the defendant with an indecent exposure of his person on a public highway, but omitted to allege that it was in the presence of divers persons or of any person.

GASTON, J., delivering the opinion of the court, says, that such allegation was unnecessary, it was sufficient if it was probable, from the circumstances, that the exposure could have been seen by the public, and the indictment was sustained. The authority upon which that decision professes to be founded, is *The King v. Crunden*, 2 Camp. 89. But we conceive that case does not sustain the form of indictment adopted in *State v. Roper*.

The form of the indictment in *King v. Crunden* is given in 2 Chit. Cr. Law, 41, from which it appears that it was charged in both courts that the defendant exposed himself naked in a public place, and "in the presence of divers of the king's subjects." The evidence was that the defendant bathed in the sea at Brighton, near to and in front of a row of inhabited houses. Although there was no direct evidence that any occupant of the houses or others had seen him, yet clearly there was evidence from which the jury might have inferred that they did. The most that can be gathered from that case is, that if one person (the witness) saw the indecent exposure, and others were actually present and might have seen it, though there is no proof that they did, "yet the law recognizes the probable risk of their seeing it, as sufficiently proximate to be dealt with as a reality." Note 7 to *Regina v. Webb*, 1 Dew. Cr. C. 338.

In the case last cited, the indictment charged that the defendant exposed his person "in a public place in a certain victualling, ale house in the presence of one M. A., the wife of E. C., and of divers others," etc. The evidence was that the defendant exposed his person to the view of M. A., she alone being present. The court

doubted about the sufficiency of the indictment, upon grounds not pertinent to the present point, and held, that if the words, "of divers others," had been omitted, it would have been bad, and as this allegation was not proved, there was no evidence to support this conviction. See also *Rex v. Watson*, 2 Cox's Cr. Cas. 376.

These cases establish, that when the nuisance charged is an offense to the sense of sight, it must be charged and proved that it was exposed to the view of divers persons.

3. And it follows that when the nuisance charged is an offense to the sense of hearing, it must be charged and proved that the profane swearing, which constitutes the offense, was *heard* by divers persons. The general allegation "*ad commune nocumentum*," is not sufficient.

In *Rex v. Loyd*, 4 Esp. 200, it was held that the noise made by a tinner in the course of his work was not an indictable nuisance, because it annoyed only the occupants of three chambers in Lincoln's Inn.

In *Regina v. Webb*, PATTERSON, J., said that the usual and proper form of an indictment for an indecent exposure, was, to charge not only that it was committed in the presence of divers persons, but also that it was "to their view."

In 2 Bish. Cr. Prac. 97, is given the form of an indictment for blasphemy and profanity, in which the words are charged to have been uttered "in the presence and *hearing* of divers," etc.

In this case it is not charged that the profane words were uttered in the *hearing* of any one. Mere presence in the town of Lumberton. or in the public street, would not (fortunately, perhaps, for the citizens) imply a hearing of all that was spoken there.

4. In *State v. Jones* it seems to be held necessary to set out the profane words in order that the court may decide as to their quality; and in the precedent in Bishop the words are set out. This would seem to be in accordance with principle.

The judgment is arrested, and this opinion will be certified to the superior court of Robeson, in order that the defendant may be acquitted and discharged.

Judgment arrested.

State v. Rushing.

STATE V. RUSHING.

(60 N. C. 29.)

Criminal law—receiving stolen goods.

If a person receives stolen goods, knowing them to be such, not for the purpose of making them his own, or of deriving profit from them, but simply to aid the thief in carrying them off, he is guilty of the crime of receiving stolen goods, knowing them to have been stolen.

INDICTMENT against the defendant for receiving some stolen cotton, knowing it to have been stolen. At the trial before his honor, CLARKE, J., at the last superior court for Wayne county, the jury found the following facts as a special verdict:

One John Newsom stole the cotton at night from one Coor's barn and started with it to one Roberts, a merchant, to sell it, and came to the house of Rushing, who lived on a public road between Coor's and Roberts'. Newsom then hired Rushing to put a part of the cotton in his (Rushing's) bag, and go along with him (Newsom), and thus help him to get the cotton to Roberts' store, to whom they offered to sell the cotton, it being under Newsom's control. Rushing then and there told Roberts that the cotton belonged to Newsom and not to himself. Roberts refused to buy, but kept the cotton until next day. Newsom sent Rushing next morning to get pay for the cotton, when Roberts still refused to pay, and Rushing said Newsom might come and get his pay or his cotton.

During the next day Coor got his cotton from Roberts, and went to see Rushing, who said he knew the cotton was stolen, because he knew Newsom was a hireling and not a cotton raiser. Upon these facts his honor was of opinion that the defendant Rushing was guilty of the charge of receiving the stolen cotton, knowing it to have been stolen, and pronounced a judgment from which the defendant appealed.

Faircloth & Grainger, for defendant.

Mr. Hargrove, attorney-general, for State.

READE, J. After another had stolen the cotton, the defendant, knowing it to have been stolen, put a part of it in his bag, and

Bledsoe v. Nixon.

helped the thief to carry it to a merchant to sell it. The question is, whether that is receiving stolen goods? It is insisted that it is not, because the defendant did not intend to make them his own or to derive any profit from them, but simply to aid the thief as a friendly act.

It is said by a respectable writer that it is not necessary that he should act from motives of personal gain. If his object is to aid the thief, it is sufficient. 2 Bish. Cr. L., § 1092. A pickpocket passes the thing stolen to one, and he to another and another in the crowd, who receive it to aid the thief; all are guilty. Guilty of the theft if there was preconcert; guilty of receiving stolen goods, knowing them to be stolen, if they only aided the thief after the act. There is no error; this will be certified.

Judgment affirmed.

BLEDSON V. NIXON.

(69 N. C. 89.)

Interest — on unpaid installments of interest.

When a promissory note is given with a stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest, as if he had given a promissory note for the amount of such interest. By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest.

ACTION for an account. The chief and in fact only question was as to the allowance of interest on the following agreement:

“This agreement made and entered into this 27th day of January, A. D. 1852, between M. A. Bledsoe and Jere. Nixon, both of the city of Raleigh, witnesseth, that the said Bledsoe for and in consideration of the sum of \$18.50 per acre has bargained and sold to the said Nixon and his heirs a certain tract or parcel of land lying in the county of Wake, on both sides of the Wild-cat branch, and bounded as follows: (Here the boundaries are given.) And it is hereby agreed by both the parties hereto that the said

Bledsoe v. Nixon.

Nixon shall execute and deliver to said Bledsoe three several notes, payable the first, on the 1st day of January, A. D. 1853; the second, on the 1st day of January, A. D. 1854; the third, on the 1st day of January, A. D. 1855; for an amount equal to the amount of the purchase-money; interest on the said notes to be paid semi-annually. And the said Bledsoe binds himself, his heirs and executors to make and execute to said Nixon a good and lawful title in fee simple to the above-named land, whenever the said notes above named are given for the purchase-money, with the interest on the same, shall be fully paid and discharged.

“Witness our hands and seals.

“M. A. BLEDSOE. [SEAL.]

“JERE. NIXON. [SEAL.]

“Witness: GEO. T. COOKE.”

When the case came on to be heard at the June term, 1873, of the superior court, before his honor, ALBERTSON, J., the plaintiff claimed to be entitled to interest on the deferred payments of interest on the above-mentioned notes, which his honor refused to allow, and allowed only simple interest on them from the time when they respectively became due. From the judgment on this part of the case the plaintiff appealed.

Smith & Strong, for plaintiff.

Haywood and Fowle, for defendant.

PEARSON, C. J. Interest is the price agreed to be paid for the use of money. Rent is the price agreed to be paid for the use of land. Hire is the price agreed to be paid for the use of a horse or other article of personal property.

Call it interest, rent or hire, it becomes a debt at the time the party promised to pay it, and from that time he is using the money of the creditor or of the landlord or of the bailor, and ought to pay for the use of it, unless he be allowed to take advantage of his own wrong in not making payment at the day.

A lessee is to pay \$100 a year rent, payable *on the first day of January in each and every year*. The rent is in arrear. The lessor may accept a promissory note of the lessee, which of course will bear interest, or he may sue and take judgment, and that will bear

interest until paid. So when a horse is hired, the price to be paid at the end of each month; so when money is lent or there is a forbearance to sue for a debt upon an agreement that interest is to be paid annually, etc.

The rule being that "when a certain sum of money is to be paid at a specified time, on failure to pay, the party is to be charged with interest." The price for the use of the money, like rent due for land or the hire of a horse, being the money of the one, which the other party is having the use of, and should pay for.

Mr. Haywood in a well-considered argument put this case: "Three years after date I promise to pay A. B. \$1,000, with interest from date." The note is not paid until the expiration of five years; why should not interest be charged upon the interest due at the end of the three years? The reply is: The parties having by *acquiescence* extended the credit from three to five years, the interest, which is an incident of the debt, goes with it, and *was not due* at the end of three years and could not have been sued for as an independent debt. It is otherwise when the note contains an express promise to pay interest at specified times. At each time there is a certain sum of money *due*, for which an action lies.

On our part we will put this case: "Three years after date I promise to pay A. B. \$1,000 with *eight* per cent interest from date, the *interest to be paid on the 1st day of January in each and every year*. The note is not paid until after the expiration of five years; why should *eight* per cent interest instead of *six* be computed after the first three years?" The reply is: The parties having by *acquiescence* extended the credit from three to five years, the interest, as an incident of the debt, goes with it, so that the debtor is not only bound to pay eight instead of six per cent for the last two years, but he is bound to pay eight per cent interest upon each deferred installment of interest, the legal effect of the indulgence given by the creditor being only an extension of the time of credit upon the terms set out in the note. A lessee for years who holds over becomes a tenant at sufferance; is bound for the same rent, may be ejected at any time, and is chargeable with interest upon the deferred installments of rent.

In our opinion the doctrine that "when there is an agreement set out in the note for the payment of interest annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest in like manner as if he had

State v. Linkhaw.

given a promissory note for the same amount," is sound on principle. By this mode of computation compound interest is not given. But a middle course is taken between simple and compound interest.

In mediam viam tutissimus ibis. By computing interest in this way effect is given to the stipulation to pay interest at fixed times; whereas, if simple interest be computed no effect whatever is given to the stipulation in regard to interest, and the court assumes the power to expunge it as surplusage, although it is manifest that the parties intended it to have some effect. Finding this doctrine settled by old cases in our State, *Kennon v. Dickson*, Con. 357, Taylor, 231, we will not open the door for further agitation, although from the briefs of counsel, we see the cases are conflicting, and "much may be said on both sides."

There is error. Interest must be computed annually. Report of clerk confirmed.

Order accordingly.

STATE V. LINKHAW.

(89 N. C. 214.)

Nuisance — disturbing religious meeting. Singing.

The disturbance of a religious congregation by singing, when the singer does not intend so to disturb it, but is conscientiously taking part in the religious services, may be a proper subject for the discipline of his church, but is not indictable.

INDICTMENT for misdemeanor. Defendant was indicted for disturbing a religious congregation. The evidence as detailed by several witnesses was substantially this: Defendant is a member of the Methodist Church; he sings in such a way as to disturb the congregation; at the end of each verse, his voice is heard after all the other singers have ceased. One of the witnesses being asked to describe defendant's singing, imitated it by singing a verse in the voice and manner of defendant, which "produced a burst of prolonged and irresistible laughter, convulsing alike the spectators, the bar, the jury and the court."

It was in evidence that the disturbance occasioned by defendant's singing was decided and serious; the effect of it was to make one part of the congregation laugh and the other mad; that the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant. It was also in evidence (without objection) that the congregation had been so much disturbed by it that the preacher had declined to sing the hymn, and shut up the book without singing it; that the presiding elder had refused to preach in the church on account of the disturbance occasioned by it; and that on one occasion a leading member of the church, appreciating that there was a feeling of solemnity pervading the congregation in consequence of the sermon just delivered, and fearing that it would be turned into ridicule, went to the defendant and asked him not to sing, and that on that occasion he did not sing. It also appeared that on many occasions the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it. To all of which he replied: "That he would worship his God, and that as a part of his worship it was his duty to sing." Defendant is a strict member of the church, and a man of exemplary deportment.

It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congregation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services.

Defendant prayed the court to instruct the jury that if the defendant did not *intend* to disturb the congregation, he was not guilty.

This instruction his honor refused, and among other things, told the jury that it would not excuse the defendant to say that it did not intend to disturb the congregation. The question is, did he intend to commit the act which *did* disturb the congregation? The jury must be satisfied that there was an actual disturbance occasioned by the defendant's act. It is a general principle that every man is presumed to have intended the necessary consequences of his own acts.

There was a verdict of guilty. Judgment, and appeal by the defendant.

W. McL. McKay and *N. A. McLean*, for appellant.

Mr. Hargrove, attorney-general, for State.

Garrett v. Cheshire.

SETTLE, J. The defendant is indicted for disturbing a congregation while engaged in divine worship, and the disturbance is alleged to consist in his singing, which is described to be so peculiar as to excite mirth in one portion of the congregation and indignation in the other.

From the evidence reported by his honor who presided at the trial, it appears that at the end of each verse his voice is heard after all the other singers have ceased, and that the disturbance is decided and serious; that the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it; to all of which he replied "that he would worship his God, and that as a part of his worship it was his duty to sing." It was further in evidence that the defendant is a strict member of the church, and a man of most exemplary deportment.

"It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congregation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services."

This admission by the State puts an end to the prosecution. It is true, as said by his honor, that a man is generally presumed to intend consequences of his acts, but here the presumption is rebutted by a fact admitted by the State.

It would seem that the defendant is a proper subject for the discipline of his church, but not for the discipline of the courts.

Venire de novo.

GARRETT V. CHESHIRE.

(60 N. C. 306.)

Constitutional law — Homestead exemption laws.

The homestead laws of North Carolina, being restrictions on former exemptions, do not impair the obligation of contracts, and are not unconstitutional, as to prior contracted debts.*

CIVIL ACTION for the delivery of personal property, tried before WATTS, J., at the spring term, 1863, of Chowan superior court.

* See the *Homestead Cases*, ante, 507.

On the 10th of May, 1871, certain executions issued against the plaintiff from Chowan superior court, on debts contracted since the adoption of the constitution in 1868. The property in controversy with other property, including a horse, was claimed and allotted to the plaintiff as his "personal property exemption," under the 10th article of the constitution, and the acts of the general assembly relating thereto, and the said executions were returned indorsed, "nothing to be found." On the 20th of May, 1871, the same property was sold under an execution from the United States circuit court, at Raleigh, for a debt contracted in 1867, at which sale defendant purchased the property and was placed in possession thereof by the marshal.

On the 21st of May, 1871, plaintiff served the defendant with the affidavit and bond in this cause, and the property was taken by the sheriff from defendant and delivered to plaintiff. About two hours after that a copy of the summons was served on the defendant, the original having been filed with the clerk.

Defendant appeared and moved to dismiss the action because it was not properly instituted. Motion refused, and defendant excepted.

Upon the trial, the defendant asked the court to charge that the property in controversy was liable to the execution from the United States court, and the seizure and sale by the marshal, under which defendant claimed, was valid. His honor declined to charge as prayed, whereupon defendant again excepted.

Verdict and judgment for the plaintiff, from which defendant, after an ineffectual motion for a new trial, appealed.

A. M. & J. A. Moore, for appellant.

Gilliam & Pruden, contra.

READE, J. The complaint alleges that on the 3d of June, 1871, the plaintiff "was the owner and in possession of one bay horse and one black mule, of the value of \$300; that on that day the defendant unlawfully took the same from his possession and converted them to his own use." There is nothing else alleged in the complaint.

The answer, after objecting to the want of a summons, "denies all the allegations in the complaint." There is nothing else in the answer.

The *case* states that the property in controversy had been allotted to the plaintiff, as his personal property exemption as against certain executions which were issued against him from Chowan superior court on debts contracted since the ratification of the constitution ; and thereupon the executions were returned to court, indorsed, "nothing to be found." This is of no importance in the case, and we suppose it was stated only to explain why the allotment had been made.

It is further stated as follows : "On the 20th of May, 1871, the same property was sold under an execution from the United States circuit court at Raleigh, for a debt contracted and due in 1867, at which sale the defendant purchased and was placed in possession by the marshal."

It is further stated, that "upon the trial the defendant asked the court to charge that the property in controversy was liable to the execution from the United States circuit court, and the seizure and sale by the marshal under which he claimed were valid."

The court refused so to charge. The jury found the issues for the plaintiff, and the defendant appealed.

Having only appellate jurisdiction, it is plain that we are confined to the record ; and that we can know no fact which is not stated, and can *decide* no point which is not raised, and must sustain his honor unless error is shown. The only error alleged is the refusal of his honor to charge that the property in controversy was liable to the execution from the United States court, and that the sale by the marshal was valid. His honor must be sustained unless we can see that the execution and sale were regular and valid. Now, if there can be such a thing as an invalid execution, we are to take it that this was invalid. It is true that it is stated that it issued upon a debt due in 1867, and if we assume what is not stated, that it was a debt due from the plaintiff, still it is not stated that there ever was any judgment upon the debt, in any court, at any time. And if there was a judgment, it is not stated whether it was alive or dormant, or whether it was against the plaintiff or some other person, or whether it was issued to the marshal, or what was its form or substance, or whether the levy and sale were regular. Surely we cannot say upon such a skillfully observed state of facts, that the defendant was entitled to the charges asked for.

And his honor could not assume that there was a regular judgment and execution, without assuming what ought to be improbable.

ble, that an inferior United States court sitting in North Carolina would subject the property of its citizens to sale, when the highest court in the State had repeatedly decided it was not subject to sale.

It was stated at the bar by the counsel on both sides that a recent decision of the United States supreme court (*Gunn v. Barry*, 15 Wall. 610), which went up from Georgia, was supposed to be in conflict with *Hill v. Kessler*, 63 N. C. 437, and several subsequent cases in this court in regard to our homestead laws ; and that it is of great importance to the public, as well as to those parties, that this court should reconsider *Hill* and *Kessler*. If it were true that the United States supreme court had decided the principles laid down in *Hill v. Kessler* contrarywise thereto, we should make haste to conform our decisions to the decisions of the United States supreme court, because in all cases within its jurisdiction that is the highest court, and the proper administration of justice and the true principles of our government, and the good order of society and the comity of courts, require subordination. We have not been furnished with an authenticated copy of the opinion in the case of *Gunn* and *Barry*, and have seen only the newspaper report, which we presume to be correct. I have considered it carefully, and I do not think it is in conflict with *Hill* and *Kessler*, or with any other decision of this court. On the contrary, it is in exact conformity with our decisions. If there is any thing seemingly in conflict it is only a *dictum* which bind neither that court nor us. The facts in *Gunn* and *Barry* were, that at the time when the Georgia homestead laws were passed *Gunn* not only had a debt against this debtor, but had sued him, and obtained a judgment against him, which judgment was a *lien* upon the debtor's land, and thereby *Gunn* had a *vested right* in the land, which the homestead laws could not divest. And therefore the United States supreme court, in its opinion, well says : "The effect of the act in question (the Georgia homestead act), under the circumstances of the judgment, does indeed not merely impair, it annihilates the remedy. There is none left. But the act goes still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property, which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation." This principle was expressly conceded by us in *Hill v. Kessler* ; and was

Garrett v. Cheshire.

expressly decided by us in *McKeitham v. Terry*, 64 N. C. 25, and was the only point in that case. And subsequently we decided that where there was the lien of a trust deed the homestead law did not operate.

It is true that it is not only *decided* in *Gunn v. Barry* that vested rights were effected in that case, but it is also said that the Georgia homestead laws impair the obligation of contracts, and are therefore void. It is also conceded in *Hill v. Kessler*, and in all cases in our court, that if our homestead laws impair the obligations of contracts, they are void, but our cases are all put upon the ground that our homestead laws do not impair the obligations of contracts. And it may very well be that the Georgia homestead laws do impair contracts, while North Carolina homestead laws do not. They are not at all alike. In order to show that the Georgia homestead laws do impair the obligation of contracts, the learned judge, in his opinion, copies the Georgia exemption laws prior to the present homestead laws to show that they were very small—land not exceeding \$200 in value, and personal property of small amount—and then he copies the homestead exemptions to show that they were very large, \$2,000 land in fee simple, with all subsequent improvements in addition, and \$1,000 personal property. And then the learned judge says: “No one can cast his eyes over the former and later exemptions without being struck by the greatly increased magnitude of the latter.” And thence the inference is, that the object of the later exemptions was not the securing of necessities to men and their families, but to defeat debts.

Now compare our former exemption laws and our present homestead laws with those of Georgia. Our act of 1856 (Rev. Code) exempts personal property, articles by name, which may be of the value of several hundred dollars, more or less, according to the circumstances of the debtor's family. And in 1866-'67, prior to the existence of the debt in the case before us, an act was passed exempting “all necessary farming and mechanical tools, one work-horse, one yoke of oxen, one cart or wagon, one milch cow and calf, fifteen head of hogs, 500 lbs. of pork or bacon, 50 bushels of corn, 20 bushels of wheat, household and kitchen furniture not exceeding \$200 in value, the libraries of attorneys at law, practicing physicians and ministers of the gospel, and the instruments of surgeons and dentists, used in their profession. Acts of 1866-'67, chap. 61.

It is apparent that an allotment of those articles approximate

Garrett v. Cheshire.

\$1,000, and in many cases would exceed that sum in value. And the same act allows a homestead of 100 acres, without restriction as to value, which in many cases would be worth, with the improvements, many thousands.

In 1868 our constitution was adopted, and in that our present homestead law is limited to \$1,000 realty, not in fee simple, but for a limited time, and personally to the value of \$500. Can it be said of our homestead law, as the learned judge said of the Georgia law, that any one in casting his eye over them, as compared with former exemptions, would be struck by the magnitude of the increase? Our homestead law is not an *increase*, but a *restriction* upon former exemptions, and they were not made to *defeat debts*, but to *secure necessities and comforts* to our citizens.

From this explanation it will be seen that the decision of the supreme court of the United States in the Georgia case conflicts in nothing with our own decisions, but they are in exact conformity. The Georgia case decides two points: first, that in that particular case the plaintiff had obtained a judgment on his debt, before the homestead laws were passed, and that in Georgia that judgment was a *lien* upon the debtor's property, which he had at its rendition; and that thereby the plaintiff had a *vested right*, a *property*, which could not be destroyed or taken from one person and given to another. We distinctly conceded this principle in *Hill v. Kessler*, and we expressly decided it in *McKeathen v. Terry*. There is then no conflict on this point. There is, however, this difference between the law of Georgia as stated in the Georgia case and the law in North Carolina: a judgment in North Carolina prior to the Code has never been held to be such a lien upon property as to create a *vested right* or *property* in the plaintiff, or to divest the property out of the defendant, or to invest it in the officer. The only force of the lien has been to prevent the debtor from selling it. It requires not only a judgment, but a *levy* to change the property. *Ladd v. Adams*, 66 N. C. 164; *Norton v. McCall*, id. 159.

The second point decided in *Gunn v. Barry* is that the Georgia homestead laws impair the obligations of contracts. We conceded, in *Hill v. Kessler*, that any law which had that effect was void. We said: "We concede that if this exemption impairs the obligation of contracts, either expressly or by implication, it is against the constitution of the United States, and therefore void. * * *

Garrett v. Cheshire.

We concede also that a contract must be understood with reference to existing laws for its enforcement." And we said, also, that the State cannot abolish or injuriously change the remedy. It is not the decision of the United States supreme court and our decisions that are in conflict, but it is the Georgia homestead laws and North Carolina homestead laws that are unlike, as has been already shown.

I know that we cannot always look to the hardship of cases to guide our decisions—they are the quicksands of the law—but still it is proper to look to the effect of our decisions, to enable us to see whether we are carrying out the purposes of legislation. What is the purpose of exemption legislation? Is it to defeat debts? We have repeatedly said that this was not the object of our exemption laws, but that the purpose was to secure necessities and comforts for our citizens. This is not left to inference, but our laws have themselves declared this to be the purpose. Rev. C., chap. 45, § 8. And this is paramount to all debts.

The supreme court of the United States in a late case (*Vann Hoffman v. The City of Quincy*, 4 Wall. 535), in speaking of exemptions which the State may make, says: "They may also exempt from sale under execution the necessary implements of agriculture, the tools of a mechanic and articles of necessity in household furniture. It is said regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity." And in a former case (*Bronson v. Kinzie*, 1 How. 311), TANEY, C. J., said the same thing, adding that "It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community." And in *Planters' Bank v. Sharpe*, 6 How. 301, Mr. Justice WOODBURY, in delivering the opinion of the United States supreme court, enumerated exemption laws among the examples of legislation which might be constitutionally applied to existing contracts. The purpose of our legislation being to secure its citizens the "necessaries and comforts" of life, and this having been decided to be a legitimate purpose, and paramount to all debts, let us see in what condition our people would be if our homestead laws are declared to be void. Our homestead and personal property exemption act repeals all other laws upon the subject. There-

fore our debtor class are to be left without any exemption whatever. Not even a bed or a crust. Nor is there any relief in bankruptcy, because a large portion of the debtors have not the means to pay the expenses, nor are their debts large enough to bring them under the bankrupt law.

And furthermore, the late amendment to the bankrupt law allows such exemptions in each State as the State law makes, and North Carolina exempts nothing.

And then we have it that exemption laws, which repeal former and larger exemption laws, and which are therefore better for the creditor, are declared void because they are too large and impair contracts. And here it is to be considered, if necessary exemptions are constitutional and unnecessary ones unconstitutional, who is to judge of what is necessary? It would seem that the legislature is the proper body. Legislatures have heretofore done it, and the legislature of every State in the Union has done it. And in no single case has a court ever done it. The nearest a court has ever come to it is in the Georgia case, in which the court says, that where there was an exemption of \$200 worth of land, and it was increased to \$2,000, the "magnitude of the increase" was palpable, and made it void. Suppose this case: A widow is allowed a year's support, say \$100, and the legislature alters the law from \$100 to \$200, would the courts undertake to say that it was unreasonable or unnecessary, and therefore void? If from \$100 to \$1,000 it would be palpable. Or suppose the same to be a debtor. I suppose the increase would have to be *striking*, and the want of necessity *palpable*. It would be verging on the ridiculous to say that the supreme court of the United States, or any other court, better knows the details of what is necessary for the "comfort and support" of the citizens of North Carolina than the legislature of the State, or that it is a question of law, unless in palpable cases. And it would be inhumanity to say, that because the legislature repealed one exemption law and substituted another and a lesser one, therefore the debtor should not have any exemption at all. And this, too, at a time when, owing to peculiar circumstances, probably one-half the debtor class are owing more *old* debts than they can pay. Nor is this view irrelevant, because, as I have already shown in the quotations from the United States supreme court decisions, exemption laws are based upon "policy and humanity;" and they do not impair, but are paramount to debts. If under our circumstances

Whitehurst v. Gaskill.

our people are to be left without any exemptions, the policy of christian civilization is lost sight of, and we might almost as well return to the inhumanity of the Twelve Tables of the Roman law. "If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market day. It may be cut into more or fewer pieces with impunity; or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber." Cooper's Justinian, 655, App.

This, at least, might not involve his wife and children in his suffering; and besides, as long as the creditor chose to keep him in custody under the Roman law, he was obliged to allow him a "pound of meal a day." But, if our exemptions are declared void, then both the debtor and his family go without even his "pound of meal."

The opinion in Hill and Kessler, the leading case in our court, was prepared with care, after much reflection and investigation; the conclusion arrived at was against my former impressions and prejudices, and against my pecuniary interest, but I was satisfied then, as I am now, that the decision was right. And it will be upheld as the law in North Carolina, unless and until the supreme court of the United States shall decide that the homestead laws of North Carolina are void.

There is no error.

Judgment affirmed.

WHITEHURST V. GASKILL.

(99 N. C. 449.)

Tax — sale of mortgaged premises for — notice to mortgagees.

The mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land for unpaid taxes.

CIVIL ACTION tried before CLARKE, J., at June term, 1873, of the superior court of Carteret county, upon the facts contained in the following case agreed:

On the 2d February, 1858, the defendant, A. W. Gaskill, being indebted to one David W. Whitehurst in the sum of \$350, executed

a mortgage of certain land to secure the payment of said debt, five years after date, at which time the mortgage was to become absolute.

The mortgage was registered the 19th of February, 1859. Gaskill, the defendant and mortgagor, remained in possession (though there was no express stipulation in the deed that he should do so), and listed the lands therein conveyed for taxes for the year 1870. The taxes not being paid, the sheriff levied on it, and returning his levy according to law, the land was ordered to be sold.

The levy was duly made, the sheriff complying with all the requirements of the law. He gave the required notice of the levy and sale to Gaskill, and on the 7th day of January, 1871, he sold the land for the said taxes, when the defendant Roberts became the purchaser, taking a receipt for amount of taxes and costs, describing the land, etc., which receipt was registered. The owner having failed to redeem, the sheriff, on the 5th of February, 1872, executed a deed for said land to Roberts, which was also registered the 18th of March, 1872.

The mortgagee, David W. Whitehurst, died in the year 1865, leaving a will, which was duly proved, and in which he devised all his lands to the plaintiff Sally, for life, remainder to the other plaintiffs, except John M. Perry, who qualified as administrator with the will annexed of the estate of said David.

No notice of the levy on the land or of the day of sale was ever served on the plaintiffs by the sheriff or any other person.

Upon the foregoing facts, his honor gave judgment of foreclosure in favor of plaintiffs, and directed that unless the defendants should pay the said sum of \$350, with interest thereon from the 2d of February, 1858, within twenty days from the 2d day of June, 1873, the clerk should, after advertising thirty days, expose the said lands at public sale at the court-house in Beaufort.

From this judgment defendants appealed.

Hubbard, for appellants, insisted that no notice to the plaintiffs was necessary. The act requiring notice to be given is merely directory; and a purchaser at a sheriff's sale acquires a title to the land sold, even though the sheriff did not advertise. 1 Murph. 311.

Haughton, contra, relied on *Taylor v. Allen*, 69 N. C. 346, *Potts v. Blackwell*, 4 Jones' Eq.; *Avery v. Rose*, 4 Dev. 549; *Reg-*

 Cogdell v. Exum.

ister v. Bryan, 2 Hawkes, 17; Cooley on Const. Lám. 521, and notes.

READE J. The question is whether the plaintiff, who represents the mortgagee, was entitled to notice of the sale of the land for taxes. The statute is express, that notice shall be given, and the only question is, who is the proper person to be notified?

The mortgagee is the legal owner of the land, and has a substantial interest in it, and is the person entitled to the notice. The sale in this case was therefore void, and the plaintiff was entitled to the order of foreclosure and sale made below.

The taxes were, however, a charge upon the land, and as the defendant Roberts paid off the taxes, he has a lien upon the land for the amount so paid. With this modification, the order below is affirmed.

This will be certified that further proceedings may be had according to law, and the rights of the parties administered according to this opinion.

Neither party will recover costs in this court, but each party will pay his own costs.

Judgment accordingly.

COGDELL, assignee, v. EXUM.

(60 N. C. 464.)

Bankruptcy — jurisdiction — limitation of actions by assignees.

An assignee in bankruptcy may sue or be sued in the courts of the State, on claims for or against the estate of the bankrupt, our courts having concurrent jurisdiction with the U. S. courts in the premises.

A, a bankrupt, brings a suit in his own name against B, on the 19th day of September, 1870; on the 11th of March, 1872, A's assignee in bankruptcy, C, who was appointed on the 25th of February, 1869, is made party plaintiff in the suit commenced by A. *Held*, that the right of action against B accrued to C, the assignee, at the time of his appointment, and that the two years' limitation in the bankrupt act, of suits by assignees, was a bar.

CIVIL ACTION tried before TOURGER, J., at the December term, 1872, of the superior court of Wayne county.

The summons in this case was issued by Z. L. Thompson, the then plaintiff, in September, 1870, who in his complaint alleged that the defendant held and had held a tract of land in trust for him ever since May, 1868, and demanded an account for rents, etc., and also a conveyance of the land.

Defendant, 4th February, 1871, filed his answer denying the material allegations in the complaint, and charging that the plaintiff, Thompson, had been adjudicated a bankrupt.

On the 6th of December, 1872, a replication was filed admitting the bankruptcy, but denying the statements contained in the answer.

At the trial term, December, 1872, the defendant was permitted to file an amended answer, of which the following is a copy: "And the defendant, by way of amendment to his answer, alleges that the supposed cause of action of the plaintiff, Daniel Cogdell" (who had at spring term, 1872, been made a party plaintiff) "assignee in bankruptcy of the said Zadoc L. Thompson, did not accrue to him, the said Daniel Cogdell, within two years next before the time, at which he, the said Cogdell, was made the party plaintiff to this action, nor within two years before the bringing of the same. Wherefore defendant demanded judgment for costs, etc.

Thompson, the original plaintiff, was adjudged a bankrupt, December 19, 1868, but has not yet been discharged. The register's deed to the assignee, Cogdell, is dated 25th February, 1869, and registered in the register's office of Wayne county, 20th January, 1873.

His honor, being of opinion that the court had no jurisdiction of this action, and the same was barred by the statute of limitations, directed the jury so to find.

Verdict for defendant. Judgment against plaintiff and his surety for costs; from which judgment plaintiff appealed.

Faircloth, for appellant.

Smith & Strong, contra.

SETTLE, J. This action was originally instituted on the 19th of September, 1870, by one Thompson, who had been adjudged a bankrupt on the 29th of December, 1868, but has not yet received his discharge. He alleges that the defendant has held a tract of

Cogdell v. Fram.

land in trust for him, ever since May, 1868, and demands an account, and payment of rents, and a conveyance of the land, etc.

The present plaintiff was appointed assignee of Thompson on the 25th of February, 1869, but was not made a party to this action until spring term, 1872, of Wayne superior court, being March the 11th, of that year

His honor being of opinion that the court had no jurisdiction of this action, and that the same was barred by the statute of limitations, directed a verdict to be entered in favor of the defendant, and gave judgment against the plaintiff for costs.

This court held that our State courts have jurisdiction in such cases. *Whiteridge v. Taylor*, 66 N. C. 273. And in the opinion of the circuit court of the United States for the district of North Carolina, reported in appendix to 65 N. C. 714, *State of North Carolina v. Trustees of the University et al.*, it is said: "We agree that the only jurisdiction actually conferred by that act is with district and circuit courts of the United States; but it does not follow that an assignee may not sue or be sued in the State courts, and we think that an assignee may sue or be sued in the State courts."

But the second section of the bankrupt act declares "that no suit at law or in equity shall, in any case, be maintainable by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee."

As has been seen, the present plaintiff had no connection with this suit until more than two years had elapsed after his appointment as assignee, when his right of action accrued. Did the amendment by which he was made a plaintiff have the effect to relate back and make him the plaintiff *ab initio*, and thereby defeat the statute of limitations in the bankrupt act; or is that limitation a bar to his recovery?

While as a general rule every court has ample power to permit amendments in the process and pleadings of any suit pending before it, both reason and authority deny the power where the amendment will evade or defeat the operation of a statute. "No court has the right to nullify a statute." *Phillips v. Higdon*, Busbee, 380.

In *Christmas v. Mitchell*, 3 Ired. Eq. 535, an amendment was allowed which introduced new matter, or rather a new charge

Cogdell v. Exum.

against the defendant, to wit: It sought to charge him with the value of certain negroes, which had not been claimed in the original bill, and the court says, "so far as this bill seeks relief against Mitchell on account of these slaves, it is an original charge brought against him for the first time, and he is entitled, as to the statute of limitations, to consider it an original bill."

In *Miller v. McIntyre*, 6 Pet. 61, Mr. Justice McLEAN, delivering the opinion of the court, says: "Various reasons are assigned against the operation of the statute in this case. It is insisted that the amended bill, filed in 1815, by which the defendants were made parties to the bill, has relation to the commencement of the suit in 1808, and consequently, that the statute cannot bar, as its limitation had not then run. Until the defendants were made parties to the bill, the suit cannot be considered as having been commenced against them." We concur with his honor, who tried the case in the superior court, that the plaintiff is barred by the limitation in the bankrupt act.

Judgment affirmed.

CASES
OF THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

TAYLOR V. CURRY.

(100 Mass. 36.)

Promissory note — negotiability.

A promissory note given to an insurance company, and otherwise negotiable, bore on its face the words: "On policy No. 33,386." *Held*, negotiable; and this although the policy contained a provision for the set-off of notes due in case of loss.

CONTRACT on three promissory notes made by defendant to his own order and indorsed by him to the Columbian Insurance Company, and by the receiver of that company indorsed to the plaintiff. The following was the form of one of the notes, and the others were substantially like it except in amounts, etc.:

"\$401.

Boston, December 23, 1864.

"Twelve months after date I promise to pay to the order of Maurice Curry, four hundred and one dollars, for value received. On policy No. 33,386. Bg. Stromness.

"MAURICE CURRY."

At the trial in the superior court, before DEVENS, J., it appeared that each of the policies mentioned in the notes contained the fol-

Taylor v. Curry.

lowing clause: "In case of loss, such loss shall be paid in sixty days after proof and adjustment thereof; the amount of the premium note, if unpaid, and all sums due to the company from the insured, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured to the satisfaction of the said company, they discounting interest for anticipating payment." The policies contained no other reference to the notes.

The judge ruled that the notes were not negotiable, and that the plaintiff could not maintain this action in his own name, and directed a verdict for the defendant, which was returned. The plaintiff alleged exceptions.

C. M. Reed, for plaintiff, besides the cases cited in the opinion, referred to *Brill v. Crick*, 1 M. & W. 232; *Wells v. Brigham*, 6 Cush. 6; *Haussoullier v. Hartsinck*, 7 T. R. 733; *Shenton v. James*, 5 Q. B. 199; *Noxon v. De Wolf*, 10 Gray, 343; *Jury v. Barker*, El., Bl. & El. 459; *Evans v. Bell*, 20 Ala. 509; *Wise v. Charlton*, 4 Ad. & El. 786; *Fancourt v. Thorne*, 9 Q. B. 312; *Arnold v. Rock River Valley Union R. R. Co.*, 5 Duer, 207; *Hodges v. Shaler*, 22 N. Y. 114; *Protection Ins. Co. v. Bill*, 31 Conn. 534.

L. S. Dabney, for defendant, cited *Palmer v. Ward*, 6 Gray, 340; *American Exchange Bank v. Blanchard*, 7 Allen, 333; *Carlos v. Fancourt*, 5 T. R. 482; *Hill v. Halford*, 2 B. & P. 413.

CHAPMAN, C. J. The body of each note contains words like these: "On policy No. 33,386. Bg. Stromness." Except for these words the notes would clearly be negotiable. The true test of the negotiability of a note is stated by Chief Justice SHAW in *Cota v. Buck*, 7 Metc. 588. To make it negotiable it must be an undertaking "to pay the amount at all events at some time which must certainly come, and not out of a particular fund or upon a contingent event." The words quoted in these notes do not express any contingency as to the payment of the notes, or refer to any fund out of which they are to be paid, but appear to refer to the consideration for which they were given. Such a reference may be for mere convenience, or for any other reason, but it cannot be interpreted as a modification of the promise. Even if the policy contains a provision for a set-off in case of loss, this does not make the payment of the note contingent upon the happening of no

Zuchtmann v. Roberts.

loss; for the language referred to does not express any such contingency. In *American Exchange Bank v. Blanchard*, 7 Allen, 333, the words were "subject to the policy." In *Osgood v. Pearsons*, 4 Gray, 455, they expressed a condition that the note was to be given up to the maker on payment; and were held to take effect according to their reasonable interpretation. Here the parties omitted to use such words as would prevent the notes from being negotiable. A mere reference to the policy, without more, does not affect the negotiability of the note. *Barker v. Valentine*, 10 Gray, 341; *Barker v. Parker*, id. 339.

It is contended that the indorsement of the receivers did not confer on the plaintiff a title to maintain this action; but the case was disposed of before that point was reached and it is not before us. When it shall be reached in the course of a new trial, one of the parties, and perhaps both, may need to introduce further evidence.

Exceptions sustained.

ZUCHTMANN V. ROBERTS.

(109 Mass. 58.)

Conditional sale — purchaser from vendee — estoppel.

Plaintiff sold a chattel to G. on condition that it should remain plaintiff's until paid for, and gave him a receipted bill of sale therefor, omitting, at G.'s request, any statement of the condition. Defendant bought the chattel of G. without notice of the condition, after having been informed by plaintiff that he had sold it to G., and after having seen the bill of sale, but before G. had paid plaintiff for it. *Held*, that in the absence of fraud, the plaintiff was not estopped to claim the chattel from the defendant.

REPLEVIN of a piano. Trial before the court, without a jury, which found the following facts:

The plaintiff, who was a seller of pianos, on February 16, 1870, sold to George F. Atwood the piano replevied, for \$600, on condition that it should remain property of the plaintiff until the price was paid. Atwood, upon the delivery of the piano to him on that condition, gave the plaintiff his promissory note as follows:

Zuchtmann v. Roberts.

“\$600. Boston, February 16, 1870. Thirty days after date, I promise to pay to the order of Frederick Zuchtmann six hundred dollars, value received; and piano, style 4, No. 1988, is the property of Frederick Zuchtmann until this note is paid in full. George F. Atwood.” This note remains unpaid. At the time of delivering the piano to Atwood, the plaintiff gave to him a receipted bill of parcels therefor, from which any statement of the conditions of sale was omitted by request of Atwood, who said that “he wished to show the bill to his wife and to a friend, to satisfy them that he had paid for the piano.” The plaintiff, on inquiry by the defendant’s agent sent to inquire as to the title, made a declaration to the agent that he had sold the piano to Atwood, of which the defendant was informed before the loan hereinafter named was made. The defendant in February, 1870, lent to Atwood \$287.51, and received from Atwood the piano, together with the bill from the plaintiff, without notice, express or implied, of the condition of sale of it by the plaintiff to Atwood, who exhibited to the defendant, in negotiating for the loan, the bill given to him by the plaintiff, as evidence of his absolute title to the piano.

Upon these facts the judge ruled that the plaintiff was entitled to the possession of the piano, as against the defendant, and found for the plaintiff, with nominal damages. The defendant alleged exceptions.

I. J. Cutter, for defendant.

C. S. Lincoln, for plaintiff.

COURT, J. Jury trial was waived, and the findings of the judge on all matters of fact are conclusive. He finds that the sale of the piano was upon express condition that the property in it should remain in the plaintiff until paid for, and that this condition had never been complied with. The other facts reported do not necessarily make out an estoppel, or prevent the plaintiff from asserting his title as against this defendant. There is no fraud found, nor is it found that the bill of parcels was given, or the statement, that he had sold the piano to Atwood, made by the plaintiff, with any knowledge or reasonable cause to believe that they were to be acted upon by anybody, or that the statement was to one who was sent as an agent by the defendant to inquire, or was intended to deceive by

Russell v. Annable.

giving Atwood a false credit. In the language of Mr. Justice CURTIS "to constitute such an estoppel, a party must have, designedly, made an admission inconsistent with the defense or claim which he proposes to set up, and another party have, with his knowledge and consent, so acted on that admission that he will be injured by allowing the admission to be disproved." *Hawes v. Marchant*, 1 Curtis' C. C. 136, 144; *Audenried v. Betteley*, 5 Allen, 382; *Turner v. Coffin*, 12 id. 401.

The case of *Cornish v. Abington*, 5 H. & N. 549, cited by the defendant, is not in conflict with this. It was an action for goods sold and delivered. There was evidence that a prior account in the same business had been made out to the defendant and paid by him, and that other invoices of goods supplied had been sent to him, charging him with the price, to which no objection was made by him to the plaintiff. The jury found that, from the manner in which the defendant had acted, the plaintiff believed he was selling the goods to him; and judgment was for the plaintiff on the ground that the defendant had so conducted himself that the plaintiff had the right reasonably to infer the existence of an agreement or license, and to act upon such inference, although the defendant did not so intend; the principle being that a party to an alleged contract cannot escape the natural and reasonable interpretation of the language used or the acts done by him, by showing that the language was used or the acts done with a different and undisclosed intent. *Wright v. Willis*, 2 Allen, 191; Chit. Cont. (5th Am. ed.) 74.

Exceptions overruled.

RUSSELL V. ANNABLE.

(100 Mass. 72.)

Partnership — bond signed by one partner — surety.

In a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, both partners were named as principals, but the bond was executed by only one of them, in the name of the firm. *Held*, that it could not be enforced against a surety without proof of the assent of the other partner to its execution. — WELLS, J., dissenting.

The sureties to a bond are not holden if the instrument is not executed by the person whose name is stated as the principal therein

CONTRACT against John F. Annable, one of the sureties to a bond executed under a statute to obtain the dissolution of an attachment on the copartnership property of Erastus Dennett and Charles R. Pottle, copartners under the firm name of Dennett & Pottle. The bond contained the names of Erastus Dennett and Charles R. Pottle as principals, and of George M. Stevens and John F. Annable, as sureties, and was executed under seal, on behalf of the principals, by one of them in the firm name.

The declaration alleged that the plaintiff, at said October term, 1869, of the superior court, duly entered the action named in the bond, and such proceedings were had therein that he obtained judgment against said Dennett & Pottle at April term, 1870, for \$110 damages and \$21.49 costs, and no part of said judgment had been paid, though the defendant had often been requested to pay the same, and the defendant owed him the amount of said judgment and the costs subsequently accrued thereon. The answer denied each and every allegation of the plaintiff.

Trial in the superior court before SCUDDER, J., who by consent of the parties reported the following case before verdict: "This was an action on a bond, of which a copy is annexed. It appeared that Erastus Dennett and Charles R. Pottle were copartners, under the firm name of Dennett & Pottle, and that the execution of the bond, as to the principal, was by one of them. It was contended by the defendant that the bond was void upon its face; also that there was no legal execution of it by the principals, and therefore it was void as to the defendant. If these objections are valid, then judgment is to be for the defendant; if invalid, then judgment for the plaintiff for \$138.83, with interest from June 24, 1870, being the date of original judgment and costs. The officer's return on the original writ and judgment may be referred to. The execution of the bond by the defendant was admitted." The return of the officer, thus referred to, certified that the property attached by him, for dissolution of which attachment the bond was given, was property of Dennett & Pottle, and that he took the bond "of said Dennett & Pottle, with George M. Stevens and John F. Annable as sureties."

J. S. Abbott, for plaintiff.

O. C. Read, for defendant.

Russell v. Annable.

AMES, J. It is well settled that one partner cannot bind his associates by affixing his signature, in the name and style of the firm, to an instrument under seal. To make such a transaction binding, it must appear that there was either a previous authority, or a subsequent ratification on the part of the other partners, adopting the signature as binding upon them. *Cady v. Shepherd*, 11 Pick. 400; *Van Deusen v. Blum*, 18 id. 229; *Swan v. Stedman*, 4 Metc. 548; *Dillon v. Brown*, 11 Gray, 179. The report in this case presents no evidence of any previous authority or subsequent ratification, and it follows that the bond is not so executed as to bind the members of the firm.

The bond purports to be the joint and several contract of certain persons named therein as principals, and the defendant and George M. Stevens as sureties. The defendant's undertaking is only that the principal obligors shall fulfill the obligation which by the terms of the bond they have assumed. But if the bond was not binding upon both Dennett and Pottle (as it was not, for want of due and proper execution of the instrument on their part), they assumed no obligation, and it was not binding upon the sureties. It was essential to the bond that the principals should be parties to it; it is recited that they are so, and the instrument is incomplete and void without their signature. The remedy of sureties against their principals might be greatly embarrassed, if such an instrument as this should be held binding. There is nothing to estop any member of the firm, who did not sign it, from denying that he was a party to it, and it was no part of the defendant's contract that he should be surety for one member of the firm, and not for both. The instrument is incomplete without the signature of each partner, or proof that the signature affixed had the assent and sanction of each of them. The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein. It should be executed by all the intended parties. *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24.

The instrument, being found incapable of taking effect as a specialty, cannot operate as a simple contract. Cases have indeed arisen in which a bond, duly executed, expressing a contract which the parties had a right to make, has been held to be valid at common law, although not made with the formalities, or executed in the mode, provided by a statute under which it purports to have

been given. See *Sweetser v. Hay*, 2 Gray, 49, and cases there cited. But we find no case in which it has been held that a written instrument, purporting to be a specialty, and plainly intended by the parties to have all the incidents and characteristics of a bond in the strict and technical sense of that word, has ever been transmuted by the court into a simple contract, for the reason that it has not been properly executed to take effect as a contract under seal.

It is therefore held, by a majority of the court, that there should be judgment for the defendant.

WELLS, J., dissenting. I am unwilling to agree that judgment shall be ordered for the defendant upon the report in this case. I fear that such a result will be a denial of justice to the plaintiff, in consequence of an imperfect disclosure of the facts of the case in the court below, and an insufficient consideration as to the real questions of law involved. It is a mischief to which parties are always exposed under the recent provision of law allowing such reports before verdict in the superior court, and without trial there. A full trial of the facts in the first instance will often obviate the necessity of any report; and will best develop the real questions of law that are important for the decision of the case. If, however, counsel consent to a report without such previous investigation and consideration of the facts upon which the rights of their clients depend, this court can only determine the case upon what is presented; and if the facts are imperfectly or insufficiently stated, the party having the burden of proof in that particular must fail.

In the present case, the bond may be good as against both Dennett and Pottle. Its execution in the partnership name by one of them would be good against both if with the authority or assent of the other, or if subsequently ratified or assented to by him. Such assent may be proved by admissions, or inferred from the acts or conduct of the other partner, at any time. *Cady v. Shepherd*, 11 Pick. 400; *Swan v. Stedman*, 4 Metc. 548; *McIntyre v. Park*, 11 Gray, 102. But, under the general denial in the answer, the burden was upon the plaintiff to prove such assent. No such fact is stated in the report, and it cannot be inferred from what is stated. If the plaintiff's right of action depends upon proof of a bond valid against both partners, he must fail for this reason.

This suit, however, is against the surety alone. Execution of the bond by him is admitted. There is a principal obligor legally bound;

Russell v. Annable.

because upon the face of the bond, and the statements of the report, the partner who signed the bond is bound thereby. *Van Deusen v. Blum*, 18 Pick. 229; *Dillon v. Brown*, 11 Gray, 179. It does not appear, and is not alleged in the answer, that the defendant was misled in regard to the execution by the principal; or that he had any reason to suppose that the instrument was to be executed otherwise than as stated in the report, and as appears on its face; or that it was not understood and intended by the defendant that it should be delivered in the form in which it now appears. It may fairly be presumed that the signatures were attached in the order in which they stand upon the paper. If so, the defendant knew that the signature of the principals was written by one of them only. If he signed it, or consented to its delivery, with knowledge of the mode in which it was executed in behalf of the principals, he is bound by it. A party to a sealed instrument may be held bound by it, notwithstanding the fact that some of the persons who are, by the form of the instrument, parties to it, have not executed it. *Cutter v. Whittemore*, 10 Mass. 442; *Adams v. Bean*, 12 id. 137; *Herrick v. Johnson*, 11 Metc. 26; *Kendall v. Karland*, 5 Cush. 74. The case of *Adams v. Bean* is especially in point.

Even if it should be held that the burden is upon the plaintiff to show that the defendant delivered or consented to the delivery of the bond under such circumstances as to bind him, notwithstanding its invalidity to bind both partners; yet this aspect of the case does not appear to have been presented in the court below, or to have been considered in drawing up the report. The point presented arises upon the objection "that there was no legal execution of it by the principals, and therefore it was void as to the defendant." This objection is sustained only by the fact stated, that it was executed in the partnership name by one of them only. As the legal result contended for does not follow conclusively from the facts stated in the report, but depends upon other facts not alleged and apparently not considered, it seems to me that the proper order in the case would be, that the report be discharged, and the case stand for trial upon the facts. The plaintiff's claim is a meritorious one, and he ought not to be defeated of his remedy upon any mere technicality. If in fact the defendant consented to the delivery of this bond knowing that it was signed by one of the principals without authority from the other, it seems to me that it would be allowing a technicality to prevail over substantial justice,

Russell v. Annable.

to permit this defense to succeed without further opportunity to prove the facts. I do not think the report requires that we should hold the plaintiff thus strictly.

There is another view of the case which leads to the same result. Even if the bond is not so executed as to be valid under the statute, it may nevertheless operate as a voluntary agreement, independently of the statute. *Sweetzer v. Hay*, 2 Gray, 49; *Wendell v. Fleming*, 8 id. 613; *Bank of Brighton v. Smith*, 5 Allen, 413. As such, it does not require a seal. And if it cannot operate as a sealed instrument to bind the partnership, it may still be construed as the contract of the partnership, according to its tenor, having the force of a simple or unsealed agreement. *Tapley v. Butterfield*, 1 Metc. 515.

This agreement was sufficiently within the scope of the partnership business to enable one partner to contract for the firm. It related exclusively to partnership interests; undertaking to pay a partnership debt when ascertained by a judgment, and securing a release of partnership property from attachment, and its surrender to the firm. This also furnished the consideration. The conditional form of the agreement does not prevent its operation as a simple contract on the part of the principals. It is joint and several therefore. The fact that it is well executed by the defendant as a sealed instrument does not prevent a recovery against him upon his contract. He cannot defend upon the ground that the obligation of the principals under the same instrument is of a different quality or degree and requiring the application of somewhat different rules in its enforcement against them. If the bond were invalid against the principal by reason only of infancy or coverture, the surety would still be held. *Herrick v. Johnson*, 11 Metc. 26, 31.

The case of *Herrick v. Johnson* is especially in point, and apparently sustains the position now sought to be maintained. In that case, the defendant was held in debt upon a sealed indenture of three parts, although the indenture had not been executed by the third party, who was the principal for the performance of whose contract in part the defendant became bound. The decision was placed upon the ground that a complete contract, independent of the indenture which was made to secure its performance, was recited in the indenture, and the defendant was thereby estopped to deny that the contract on the part of the principal, as recited, did in fact

Campbell v. Dearborn.

exist. The dissenting opinion of Chief Justice SHAW does not, in my view, conflict with, but rather sustains the positions which I have endeavored to maintain in this case.

Upon either aspect of the case, and as a result either of authority or of correct legal reasoning, I do not think it follows that a bond is void against a surety, who admits its execution, and neither alleges nor proves any ground of avoidance, except that it appears to have been executed in the partnership name by one of two partners named as principals, without evidence of authority or legal assent from the other partner; it being a transaction proper for the protection of the interests of the copartnership. I say it does not follow, because, as a legal proposition, it depends upon other facts which are neither stated nor denied.

When a report or agreed statement fails to cover all the facts necessary for a conclusive determination of the legal question sought to be presented, it is not a proper case for an order of final judgment.

Judgment for the defendant.

CAMPBELL V. DEARBORN.

(109 Mass. 130.)

*Mortgage — when a deed absolute will be treated as — Power of court of equity —
Parol evidence.*

Plaintiff bought land with money borrowed from the defendant, and then conveyed it to defendant by deed absolute; but both parties understood that the conveyance was intended as security for the loan. *Held*, that on parol proof of these facts plaintiff was entitled to maintain a bill in equity to redeem the land as from a mortgage.

BILL in equity to compel a reconveyance of land to plaintiff by defendant. The bill alleged in substance that on June 11, 1866, plaintiff agreed with one Tirrill for the purchase by him (plaintiff) of the land in question, and at the same time Tirrill gave a bond to convey the land at any time within three years upon payment of \$5,500; that since taking the bond the plaintiff had occupied the

land ; that before the expiration of the said three years plaintiff made arrangements with one Walker to borrow the said sum of \$5,500 in order to tender it to said Tirrill within the time fixed, and to secure performance of his obligation to convey ; that not getting the money from Walker, the defendant, on the 11th of June, 1869, voluntarily offered to lend to the plaintiff the required amount, and the plaintiff accepted the offer as an act of friendship, as he supposed ; that the defendant and plaintiff went immediately to Tirrill and tendered to him said sum of \$5,500, and Tirrill thereupon delivered to the plaintiff his deed of the land in fee simple, in compliance with the bond, which deed was dated May 21, and was acknowledged before the defendant as a justice of the peace on said June 11, 1869 ; that thereupon the defendant suggested to the plaintiff that he ought to be secured for his loan in some way, and proposed that they should go to the defendant's attorney, to have the necessary papers prepared ; that they thereupon went to the attorney's office, where the defendant and the attorney consulted together privately, and, without consulting the plaintiff, an instrument was drawn, and handed to him to sign, which upon reading he found to be drawn to convey the land in fee simple to the defendant ; that the plaintiff objected to this form of conveyance, and desired to have a mortgage drawn instead, but was assured by both the attorney and the defendant that the instrument prepared would have the same effect ; that, being ignorant of the legal effect of said instrument made under such circumstances, and relying on the statements of the attorney and the defendant, he on said June 11 executed and delivered said deed to the defendant ; and that it was recorded in the registry of deeds at the same time with Tirrill's deed.

The bill also alleged that the plaintiff believed that the loan was to be temporary and was prompted by kindness ; that he had tendered the sum borrowed to defendant with interest and demanded a reconveyance to him, but that defendant had refused the tender and to execute a deed of reconveyance.

The prayer was "that the plaintiff may have proper relief in the premises ; that an account may be taken of what, if any thing, is due to the defendant for principal and interest on said loan ; that the plaintiff may be permitted to redeem the land, he being ready and willing, and hereby offering, to pay what, if any thing, shall appear to be due in respect to said loan and interest accrued : and

Campbell v. Dearborn.

that the defendant may be decreed to convey the land to the plaintiff in fee, free from all incumbrances made by him or any person claiming under him, and may be restrained from making any sale or conveyance thereof to any person or persons pending this bill."

The defendant, in his answer, denied that the money was a loan to plaintiff, but alleged that "the defendant agreed to pay Tirrill the said sum of \$5,500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name;" that the premises were conveyed to defendant for his own use and benefit, and that the title, both legal and equitable, were in him.

The plaintiff filed a general replication, and the case was heard by COLT, J., who made the following report thereof:

"The plaintiff was the only witness in support of his case, and testified substantially to the facts stated in the bill. The defendant testified in substance to the facts stated in his answer, and was confirmed in the main part of his evidence by the testimony of the attorney who prepared the deed from the plaintiff to him, but who also testified more fully to what was said between the parties at his office at the time the deed was executed. The witnesses appeared to me to be equally entitled to credit.

"I find as a fact, that the deed to the defendant was executed by the plaintiff intelligently, and not by accident or mistake; and that no fraud was practiced to procure its execution, other than may be inferred, if any, from the facts testified to and here found by me. I find, from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed, and had reason to believe, that the payment made to Tirrill was made to prevent a forfeiture of the plaintiff's rights under the contract, as a friendly act on the part of the defendant, with a view to give him further time to raise the money due thereon, and that the defendant would within a few days, on being repaid the purchase-money and a compensation for his trouble, reconvey the same to him. It appeared that no definite time was named for the repayment, and no definite amount was fixed as compensation; and that the defendant refused to take a mortgage instead of an absolute deed, insisting upon the ownership of the property, and the right to charge what he had a mind to for his services, in case he should reconvey.

"I report the case for the consideration of the full court, such order or decree to be entered as law and justice may require."

G. A. Somerby, G. B. Bigelow and S. C. Darling, for plaintiff.

W. S. Gardner, for defendant.

WELLS, J. Regarding the money paid to Tirrill for the land as the money of the plaintiff, by loan from the defendant, there is still no resulting trust in favor of the plaintiff arising from the whole transaction. A deed was taken to the plaintiff, according to his equitable interest, and he thereupon conveyed to the defendant by his own deed. The recitals and covenants of that deed preclude him from setting up any trusts by implication, against its express terms. *Blodgett v. Hildreth*, 103 Mass. 484. His agreement with the defendant for a reconveyance cannot be enforced as a contract for an interest in lands. Gen. Stat., chap. 105, § 1. Nor will it create an express trust. *Id.*, chap. 100, § 19. The question, then, is, can the deed be converted into a mortgage, or impeached and set aside, or its operation restricted, upon any ground properly cognizable in a court of chancery?

This question was somewhat discussed, though not decided, in *Newton v. Fay*, 10 Allen, 505. Some suggestions were made as to the bearing of the statute of frauds upon it, in *Glass v. Hulbert*, 102 Mass. 24. For the reasons there suggested, we do not regard the statute of frauds as interposing any insuperable obstacle to the granting of relief in such a case; because relief, if granted, is attained by setting aside the deed; and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transaction and the facts and circumstances of the case, among which may be included the real agreement. It does not violate the statute of frauds, to admit parol evidence of the real agreement, as an element in the proof of fraud or other vice in the transaction, which is relied on to defeat the written instrument.

What will justify a court of chancery in setting aside a formal deed, and giving the grantor an opportunity to redeem the land,

on the ground that it was conveyed only for security, although no defeasance was taken, is a question of great difficulty, and one upon which there exists a considerable diversity of adjudication, as well as of opinion. In Story's Eq., § 1018, it is stated in general terms to be "fraud, accident and mistake." In 4 Kent's Com. (6th ed.) 142, 143, it is laid down that "parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise or mistake."

"It is determined, on the statute of frauds, that, if a mortgage is intended by an absolute conveyance in one deed and a defeasance making it redeemable in another, the first is executed, and the party goes away with the defeasance, that is not within the statute of frauds." *Dixon v. Parker*, 2 Ves. Sen. 219, 225. Similar declarations are to be found in *Walker v. Walker*, 2 Atk. 98; *Joynes v. Statham*, 3 id. 388, and *Maxwell v. Montacute*, Pre. Ch. 526; and adjudications in *Washburn v. Merrills*, 1 Day, 139; *Daniels v. Alford*, 2 Root, 196, and *Brainerd v. Brainerd*, 15 Conn. 475; and see Story's Eq., § 768.

This indeed is only one form of application of the general rule of equity, that one, who has induced another to act upon the supposition that a writing had been or would be given, shall not take advantage of that act, and escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault. Besides the cases cited in *Glass v. Hulbert*, 102 Mass. 24; S. C., 3 Am. Rep. 418, see *Bartlett v. Pickersgill*, 1 Eden, 515; S. C., 1 Cox's Ch. 15; Browne on Stat. of Frauds, § 94. But this principle will not help the plaintiff here, because he does not allege that any defeasance was intended or expected, and it is found by the report that the deed "was executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practiced to procure its execution, other than may be inferred" from the facts stated.

From those facts, and from the bill and answer, we think these points must be taken to be established, to wit: 1st, that the plaintiff had purchased the parcel of land in controversy and held a contract from Tirrill for its conveyance to himself upon payment of the sum of \$5,500; 2d, that the money was paid to Tirrill, and the land conveyed by Tirrill to the plaintiff, in fulfillment of that contract; 3d, that the money was advanced by the defendant to

Campbell v. Dearborn.

the plaintiff as a loan, and the deed from the plaintiff to the defendant was given by way of security therefor. The report finds, "from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe" this to be the case.

The defendant, in his answer, does not pretend that he ever made any contract, either with Tirrill or the plaintiff, by which a price was agreed upon to be paid by him as and for the purchase of the premises for himself. His only allegation to this point is, at most, indirect and equivocal. He denies that said estate was purchased of Tirrill for the plaintiff's benefit, "neither did this defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant." This is followed by an argumentative assertion of equitable title acquired as a resulting trust from payment of the purchase-money, and that the deed from the plaintiff was given "for the purpose of vesting both the legal and equitable title in the defendant." He does allege that he "agreed to pay Tirrill the said sum of \$5,500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name." He alleges, with sufficient fullness and minuteness, that he refused to make a loan of the money to the plaintiff both "before and at the time of said payment to said Tirrill," and refused "to allow the plaintiff to have any interest in said money, or the premises purchased therewith," and that it was agreed that the premises should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto." He further avers "that, before the plaintiff signed and executed his deed to this defendant, said deed was read in the presence and hearing of the plaintiff, and he was then and there informed that the same was an absolute conveyance, and that he ceased thereby to have any interest whatever therein." Taking the facts to be literally as thus alleged, they significantly suggest the inference that the money was advanced by the defendant for the accommodation of the plaintiff in his purchase of the land, and the deed given to the defendant for his security therefor; but that it was agreed between them that the plaintiff should retain no legal right of redemption. He was to trust himself wholly to the good faith and forbearance of the defendant.

It is alleged in the bill, and not denied in the answer, that the land has been all the time in the occupation of the plaintiff. We

Campbell v. Dearborn.

think it is also to be inferred that the land is of considerably greater value than the sum advanced by the defendant.

From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery. *Hughes v. Edwards*, 9 Wheat. 489; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208; *Morris v. Nixon*, 1 How. 118; *Russell v. Southard*, 12 id. 139; *Taylor v. Luther*, 2 Sumn. 228; *Flagg v. Mann*, id. 486; *Jenkins v. Eldridge*, 3 Story, 181; *Bentley v. Phelps*, 2 Woodb. & Min. 426; *Wyman v. Babcock*, 2 Curtis' C. C. 386, 398; S. C., 19 How. 289. Although not bound by the authority of the courts of the United States, in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the State and Federal courts. We are disposed therefore to yield much deference to the decisions above referred to, and to follow them, unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

The decisions in the Federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance "be omitted by design upon mutual confidence between the parties." In *Russell v. Southard*, 12 How

139, 148, it is declared to be the doctrine of the court, "that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." The conclusion of the court was, "that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void. 4 Kent's Com. (6th ed.) 159; Oruise's Dig. (Greenl. ed.), tit. 15, chap. 1, § 21; 2 Washb. Real Prop. (3d ed.) 42; Williams on Real Prop. 353; Story's Eq., § 1019; Adams' Eq. 112; 3 Lead. Cas. in Eq. (3d Am. ed.); White & Tudor's notes to *Thornbrough v. Baker*, pp. 605 [*874] *et seq.*; Hare & Wallace's notes to S. C., pp. 624 [*894] *et seq.*

The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed or some other instrument under seal. *Erskine v. Townsend*, 2 Mass. 493; *Killoran v. Brown*, 4 id. 443; *Taylor v. Weld*, 5 id. 109; *Carey v. Rawson*, 8 id. 159; *Parks v. Hall*, 2 Pick. 206, 211; *Rice v. Rice*, 4 id. 349; *Flagg v. Mann*, 14 id. 467, 478; *Eaton v. Green*, 22 id. 526. The case of *Flagg v.*

Campbell v. Dearborn.

Mann is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact, and not a mere security for a loan.

By the statute of 1855, chap. 194, section 1, jurisdiction was given to this court in equity "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages." Gen. Sts., chap. 113, § 2. The authority of the courts, under this clause, is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

If then the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of non-payment at the stipulated time, or an absolute deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought not to interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that those words are falsely written as a cover for the wrong practiced, or an evasion of the right of redemption. In the other it is without an instrument or clause of defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. "For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud." *Cotterell v. Purchase*, Cas. Tem. Talbot, 61. See also *Barnhart v. Greenshields*, 9 Moore's P. C. 18; *Baker v. Wind*, 1 Ves. Sen. 160; *Mellor v. Lees*, 2 Atk. 494; *Williams v. Owen*, 5 Myl. & Cr. 303; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

As a question of evidence, the principle is the same. In either

case the parol evidence is admitted, not to vary, add to or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings, by restricting their operation, or defeating them altogether. This is a general principle of evidence, well established and recognized both at law and in equity. *Stackpole v. Arnold*, 11 Mass. 27; *Fletcher v. Willard*, 14 Pick. 464; 1 Greenl. Ev., § 284; Perry on Trusts, § 226.

The reasons for extending the doctrine, in equity, to absolute deeds, where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to *Woollam v. Hearn*, 2 Lead. Cas. in Eq. (3d Am. ed.) 676, and to *Thornbrough v. Baker*, 3 id. 624. See, also, Adams' Eq. 111; 1 Sugd. Vend. (8th Am. ed.), Perkin's notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other States. Mr. Washburn, in his chapter on Mortgages, § 1, has exhibited the law as held in the different States, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here. 2 Washb. Real Prop. (3d ed.) 35, *et seq.*

Upon the whole, we are convinced that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt.

It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed.

The chief inquiry is, in most cases, whether a debt was created by the transaction, or an existing debt, which formed or entered into the consideration, continued and kept alive afterward. "If

Campbell v. Dearborn.

the purchaser, instead of taking the risk of the subject of the contract on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mortgage security." 1 Sugd. Vend. (8th Am. ed.) 302, in support of which the citations by Mr. Perkins are numerous. But any recognition of the debt as still subsisting, if clearly established, is equally efficacious; as the receipt or demand of interest or part payment. *Eaton v. Green*, 22 Pick. 526, 530.

Although proof of the existence and continuance of the debt, for which the conveyance was made, if not decisive of the character of the transaction as a mortgage, is most influential to that effect, yet the absence of such proof is far from being conclusive to the contrary. *Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 id. 467, 478; *Russell v. Southard*, 12 How. 139; *Brown v. Dewey*, 1 Sandf. Ch. 56. When it is considered that the inquiry itself is supposed to be made necessary by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt, manifested by a written acknowledgment or an express promise to pay, should be regarded as of more significance than the absence of a formal defeasance. It of course compels the party attempting to impeach the deed to make out his proofs by other and less decisive means. But as an affirmative proposition it cannot have much force.

A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor. Hence inadequacy of price, in such a case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists; *Story's Eq.*, §§ 239, 245, 246; and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so. *Kerr on Fraud and Mistake*, 186 and note; *Wharf v. Howell*, 5 Binn. 499.

Another circumstance, that may and ought to have much weight, is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance. *Cotterell v.*

Cardinal v. Smith.

Purchase, Cas. Temp. Talbot, 61; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

These several considerations have more or less weight, according to the circumstances of each case. *Conway v. Alexander*, 7 Cranch, 218; *Bentley v. Phelps*, 2 Woodb. & Min. 426. It is not necessary that all should concur to the same result in any case. Each case must be determined upon its own special facts; but those should be of clear and decisive import.

In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase-money at the request of the plaintiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land reconveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer.

We must declare, therefore, that in equity he holds the title subject to redemption by the plaintiff in such manner and upon such terms as shall be determined upon a hearing therefor before a single justice.

Decree accordingly.

CARDINAL V. SMITH.

(100 Mass. 158.)

Malicious prosecution — Final determination of action — Failure of plaintiff to appear.

Declaration alleging that defendant maliciously, and without probable cause, procured the arrest and holding to bail of plaintiff, on a writ in a civil action, returnable at a certain time, at which the plaintiff appeared, but defendant did not nor was said writ ever returned. Demurrer on the ground that it appeared that the suit alleged to be malicious was not determined in favor of the defendant therein by a judgment of the court. *Held*, that the declaration was good.

Cardinal v. Smith.

TORT for malicious prosecution. The declaration alleged that the defendant maliciously, and without probable cause, procured the arrest and holding to bail of the plaintiff in this action on a writ in a civil action, returnable to the superior court, at the September term, 1869; that the plaintiff "duly appeared at said court to which said writ was returnable; but that the defendant did not appear, well knowing that he had no probable cause to maintain the action against the plaintiff, nor was said writ ever returned into the office of the clerk of said court." The defendant demurred, on the ground that it appeared "that the suit alleged to be malicious was not determined in favor of the defendant therein by a judgment of court." The superior court sustained the demurrer, and the plaintiff appealed.

G. Stevens, for defendant.

C. Cowley, for plaintiff.

GRAY, J. The general rules of law governing actions for malicious arrest and prosecution have long been well settled. In the words of Lord CAMDEN, "this is an action for bringing a suit at law; and courts will be cautious how they discourage men from suing; when a party has been maliciously sued and held to bail, malice, and that it was without any probable cause, must be alleged and proved." *Goslin v. Wilcock*, 2 Wils. 302, 307. "The new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust." Bul. N. P. 12.

When the prosecution alleged to have been malicious is by complaint in behalf of the government for a crime, and in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown; and a *nolle prosequi* entered by the attorney for the government is not sufficient; for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint. Bul. N. P. 14; *Bacon v. Towne*, 4 Cush. 217; *Parker v. Farley*, 10 id. 279; *Bacon v. Waters*, 2 Allen, 400. But if it is commenced by complaint to a magistrate who has jurisdiction only to bind over or discharge, his record, stating that the complainant withdrew his prosecution and it was thereupon ordered that the accused be discharged, is equivalent to an acquittal.

Sayles v. Briggs, 4 Metc. 421, 426. If the accused, after being arrested, is discharged by the grand jury's finding no indictment, that shows a legal end to the prosecution. *Jones v. Givin*, Gilb. 185, 220; *BULLER, J.*, in *Morgan v. Hughes*, 2 T. R. 225, 232; *Freeman v. Arkell*, 2 B. & C. 494; S. C., 3 D. & R. 669; *Michell v. Williams*, 11 M. & W. 205; *Bacon v. Waters*, 2 Allen, 400. And if the prosecutor, after procuring the arrest, fails to enter any complaint, this, with the attending circumstances, is sufficient to be submitted to the jury as evidence of want of probable cause. *Venafra v. Johnson*, 10 Bing. 301; S. C., 3 Moore & Scott, 847, and 6 C. & P. 50; *McDonald v. Rooke*, 2 Bing. (N. C.) 217; S. C., 2 Scott, 359.

When the suit complained of is a civil action, wholly under the control of the plaintiff therein, it would seem that a discharge thereof by him, without any judgment or verdict, is a sufficient termination of the suit; and that, for instance, if one maliciously causes another to be arrested and held to bail for a sum not due, or for more than is due, knowing that there is no probable cause, and, after entering his action, becomes nonsuit, or settles the case upon receiving part of the sum demanded, an action for a malicious prosecution may be maintained against him. *Nicholson v. Coghill*, 4 B. & C. 21; S. C., 6 D. & R. 12; *Watkins v. Lee*, 5 M. & W. 270; *Ross v. Norman*, 5 Exch. 359; *Bicknell v. Dorion*, 16 Pick. 478, 487; *Savage v. Brewer*, id. 453. In *Arundell v. White*, 14 East, 216, it was held that an entry in the minute book of the sheriff's court in London, opposite the entry of a suit in that court, that it was withdrawn by the plaintiff's order, was sufficient evidence of a termination of that suit to sustain an action for malicious prosecution. In *Pierce v. Street*, 3 B. & Ad. 397, the declaration, after setting out the suing out of a writ in an ordinary action at law against the plaintiff, and an arrest and holding to bail thereon, and alleging that it was done maliciously and without probable cause, averred that no proceedings were thereupon had in that action, and that the plaintiff therein did not declare against the defendant nor prosecute his suit against him with effect, but voluntarily permitted the action to be discontinued for want of prosecution thereof, whereupon and whereby, and according to the practice of the court, the suit became determined. At the trial of the action for malicious arrest, it appeared that no declaration was delivered or filed in the former action, and that this action was not commenced

Scott v. Harmon.

until a year after the return day of that. It was objected that, there being no judgment of court, there was no evidence of the determination of the suit, to satisfy the averment in the declaration. But Lord LYNDEHURST, C. B., thought there was, and overruled the objection; and his ruling was confirmed by the court of queen's bench, Lord TENTERDEN, C. J., saying: "The length of time which had elapsed shows that the suit was abandoned altogether;" and PARKE, J., "When the cause is out of court, it must be considered as determined." Our own statutes expressly provide that, if no declaration is inserted in the writ, or filed before or at the return term, it shall be a discontinuance of the action. Gen. Sta., chap. 129, § 9.

But the present case does not require us to consider what disposition must be shown of a civil action which has once been entered in court, in order to constitute a fatal determination thereof. A plaintiff cannot be compelled to enter his action, and, until he does, may judge for himself whether he will proceed with it or not. If he does not enter it, it never comes before the court, nor becomes the subject of any judgment, nor appears on its records, unless the defendant, upon filing a complaint at the return term, obtains judgment for his costs. If the defendant does not make such a complaint, the action is not the less finally abandoned and determined by the neglect of the plaintiff to proceed with it. *Clark v. Montague*, 1 Gray, 446, 448; *Lombard v. Oliver*, 5 id. 8; *Jewett v. Locke*, 6 id. 233. The only cause assigned for the demurrer being that the declaration shows no determination of the former suit in favor of the defendant therein by a judgment of court, it must be

Overruled.

SCOTT V. HARMON.

(100 Mass. 237.)

Attorney and client — champerty

An attorney was employed to bring an action, the client agreeing to give or allow and pay him the first fifty dollars collected by him therein. *Held*, not champertous.

CONTRACT by an attorney at law to recover for services and disbursements in a certain suit brought by him for defendant herein to enforce a mechanic's lien.

At the trial in the superior court, before DEVENS, J., the plaintiff put in the report of an auditor in his favor; but it appeared that the services and disbursements sued for were all rendered and made under the following agreement, signed and sealed by the defendant: "November 11, 1869. In consideration of one dollar, the receipt of which I hereby fully acknowledge, I hereby agree to give or allow and pay to G. C. Scott the first fifty dollars that is collected by him in enforcing my mechanic's lien for labor and services performed on the house occupied by D. G. Leavitt, on Gold street, in Lowell." The defendant contended that this contract was fraudulent, illegal and barratrous.

The judge reported the question of law thus arising for the determination of this court. If the action could be maintained on these facts, judgment was to be entered for the plaintiff in accordance with the report of the auditor; otherwise, for the defendant.

J. O. Kimball, for plaintiff.

A. F. Jewett (*T. Wentworth* with him), for defendant.

COLT, J. Champerty is defined to be "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it," "whereupon the champertor is to carry on the party's suit at his own expense." 1 Hawk. P. C., chaps. 83, 84; 4 Bl. Com. 135.

The agreement relied on here does not come within this definition. There is no undertaking, disclosed or implied, on the part of the plaintiff, to carry on any suit at his own expense, or to look alone to that which might be recovered for his compensation. It does not appear that his pay was dependent on his success, which is the important element deemed prejudicial to the public repose, and therefore declared illegal. *Thurston v. Percival*, 1 Pick. 415,

Nor is the transaction obnoxious to the statute, which provides that counselors and attorneys "shall not directly or indirectly buy or be interested in buying, or directly or indirectly loan or advance, or agree to loan or advance, any money or other goods, or give or promise any valuable consideration whatever to any person, as an

Heard v. Eldredge.

Inducement to place, or in consideration of having placed in the hands of any person, any bond, note, book debt, or right of action for collection, with intent to make themselves any gain from the fees arising from such collection by a suit at law." Gen. Stat., chap. 122, § 6. In *Allen v. Hawks*, 13 Pick. 79, the agreement proved was an agreement to pay to the agent a portion of the fees of collection if he would employ the attorney to collect demands due the principal. Here the written agreement appears to be nothing more than a mode adopted for giving the plaintiff a lien on a portion of the debt claimed to be due, as security for his services and disbursements.

Judgment for the plaintiff.

HEARD V. ELDRIDGE.

(100 Mass. 258.)

Trust — dividends of corporations when capital.

Where the property of a corporation consists wholly of real estate, and a part of it is taken by the right of eminent domain, the compensation therefor, if distributed as a dividend to the shareholders, belongs to the capital and not to the income of a trust fund invested in the shares.

APPEAL from the allowance by a judge of probate of an account filed by John T. Heard and another, trustees, under the will of one Trull. Said Trull had devised to said trustees the residue of his estate in trust, "to receive and collect the income and produce thereof, and, after deducting all needful and proper costs, charges and expenses, to pay the residue of said income from time to time" to the appellant, Elizabeth Eldredge, who was the testator's daughter. The will gave the trustees "full power and authority to invest, reinvest and change any and all property of which the trust premises shall be at any time composed."

The first ground of the appeal was because the trustees did not credit the appellant with \$4,350 received by them in the year 1870, as a dividend upon twenty-nine shares in the capital stock of the Lewis Wharf Company, which belonged to the trust fund, but treated the same as capital and not income of the fund. The

Heard v. Eldredge.

property of that corporation consisted of a wharf and dock, and warehouses on the wharf, in Boston.

The case was heard by WELLS, J., and reserved for the determination of the full court, upon the pleadings and evidence, from which the facts appeared which are recited above. The other facts are stated in the opinion.

C. A. Welch, for appellees.

F. V. Balch, for appellant.

CHAPMAN, C. J. The appellees, as trustees under the will of John W. Trull, became proprietors of twenty-nine shares of stock in the Lewis Wharf Company. Its property consisted of real estate in Boston, and its income consisted of rents and wharfage. The city authorities took a part of the real estate, by right of eminent domain, for the laying out of Atlantic avenue, and have paid the corporation therefor \$185,000. The directors have divided \$75,000 of this money among the stockholders, and reserved the balance. Mrs. Eldredge, the appellant, contends that this dividend belongs to her as income; but the trustees have treated it as capital, of which she, as tenant for life, is entitled to the income only.

The appellant contends that the dividend is hers, under the rule laid down in *Minot v. Paine*, 99 Mass. 101, and the subsequent cases of *Daland v. Williams*, 101 id. 571, and *Leland v. Hayden*, 102 id. 542. But those cases are quite unlike this. If the city had taken the whole of the company's land, it would be plain that they had taken its capital. A dividend of the money received for it would be a dividend of capital, of which the tenant for life ought to have the income only. The taking of a large part of the land makes no substantial difference in principle. It converts a part of the capital from real estate into personal. No difficult or complicated process is necessary to ascertain what elements enter into the dividend. It is clearly a dividend of a part of the capital; and an impartial execution of the trust will not permit it to be taken entirely away from the remaindermen. The tenant for life should have only the income.

The suggestion that the intention of the directors should determine the question whether the dividend is capital or income cannot be correct. They may have had no intention on the subject, and

 Metallic Compression Casting Co. v. Fitchburg Railroad Co.

if they had, and if it could be ascertained, it might mislead us. It is more safe to look at the character of the property and the transaction.

As the trustees are authorized by the will to change investments, and are directed to pay the residue of the income to the tenant for life after deducting all proper costs, charges and expenses, the brokerage is properly classed among the expenses, and charged upon the income.

Decree affirmed.

 METALLIC COMPRESSION CASTING COMPANY V. FITCHBURG RAILROAD COMPANY.

(109 Mass. 277.)

Negligence—rights of firemen in case of fire—severance of hose.

In order to extinguish a fire in plaintiff's building it was necessary to, and firemen did, lay a hose across defendant's railroad. Defendant's servants, with notice of the presence of the hose, and although having time to stop the train until the hose could be uncoupled, ran a train over and severed the hose, thereby cutting off the water from the fire which otherwise might and probably would have been extinguished, and the building was consumed. *Held*, that the hose was lawfully laid across the track, and that the act of the defendants' servants was the proximate cause of the destruction of the building, and that the defendants were liable.

TORT against a railroad company for damages. The cases were reported to this court for an opinion. The opinion states the case.

R. H. Dana, Jr., for plaintiffs, cited *Atkinson v. Newcastle and Gateshead Waterworks Co.*, Law Rep., 6 Exch. 404; *Hart v. Western Railroad Co.*, 13 Metc. 99; *Safford v. Boston and Maine Railroad*, 103 Mass. 583; *Smith v. London and South-western Railway Co.*, Law Rep., 6 C. P. 14; *Davis v. Garrett*, 6 Bing. 716; *Dickinson v. Boyle*, 17 Pick. 78; *Baltimore and Ohio Railroad Co. v. Thompson*, 10 Md. 76; *Willey v. Fredericks*, 10 Gray, 357; *Scott v. Shepherd*, 2 W. Bl. 892; *Vandenburgh v. Truax*, 4 Denio, 464; *Powell v. Salisbury*, 2 Y. & J. 391; *Gilbertson v. Richardson*, 5 C. B. 502; *Lynch v. Nurdin*, 1 Q. B. 29; *Borradaile v. Brunton*,

 Metallic Compression Casting Co. v. Fitchburg Railroad Co.

8 Taunt. 535; *Lee v. Riley*, 18 C. B. (N. S.) 722; *The George & Richard*, Law Rep., 3 Adm. & Eccl. 467; *Bailiffs of Romney Marsh v. Trinity House*, Law Rep., 5 Exch. 204; *Byrne v. Wilson*, 15 Irish Law, 332; *White v. Moseley*, 8 Pick. 356; *Saxton v. Bacon*, 81 Vt. 540; *Scott v. Hunter*, 48 Penn. St. 192; *Rylands v. Fletcher*, Law Rep., 3 H. L. 330; *Jones v. Festiniog Railway Co.*, Law Rep., 3 Q. B. 733.

T. H. Sweetser and N. St. J. Green (W. S. Stearns with them), for defendants, cited Stat. 1855, chap. 452, § 1; Gen. Stata., chap. 63, §§ 93, 94; chap. 24, §§ 7, 26; Sedgwick on Damages (5th ed.), 82, and cases cited; Sourdlat, *Traité de la Responsabilité*, §§ 42, 44, 105, 106; *Mott v. Hudson R. R. Co.*, 1 Robt. 585; *Bailiffs of Romney Marsh v. Trinity House*, Law Rep., 5 Exch. 204; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Denny v. N. Y. C. R. R. Co.*, 13 Gray, 481; *Marble v. Worcester*, 4 id. 395; *Connecticut Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265; *Anthony v. Slaid*, 11 Metc. 290; *Silver v. Frazier*, 3 Allen, 382; *Williams v. Adams*, id. 171; *Hutchins v. Hutchins*, 7 Hill, 104; *New York Academy of Music v. Hackett*, 2 Hilt. 219; *Crain v. Petrie*, 6 Hill, 522; *Lamb v. Stone*, 11 Pick. 527; *Brown v. Cummings*, 7 Allen, 507; *Waite v. Gilbert*, 10 Cush. 177; *Parsons v. Pettingell*, 11 Allen, 507.

CHAPMAN, C. J. The case is reserved upon the evidence offered by the plaintiffs. That evidence would authorize the jury to find substantially as follows:

On the 24th of January, 1870, a little before midnight, the plaintiffs' manufacturing establishment was discovered to be on fire. The buildings were situated in Somerville, about fifty feet south of the track of the Fitchburg Railroad. Two fire-engines were soon brought upon the ground, belonging to the Somerville fire department, and one from Cambridge. Not being able to procure a supply of water otherwise, they laid the hose across the track, under the direction of the chief engineer of the Cambridge fire department, and obtained a supply from a hydrant on the north side of the track. The water was, by means of the hose, applied to the fire, and had diminished it, and would probably have extinguished it in a short time but for the acts of the defendants. At that time a freight train came along from the west, and though its managers had sufficient notice and warning, and might have stopped, and

Metallic Compression Casting Co. v. Fitchburg Railroad Co.

had no occasion for haste, they paid no attention to the hose, but carelessly passed over it with their train, and thereby severed it, and stopped the water. They injured the hose so much that it could not be seasonably repaired ; and thereby the plaintiffs' buildings and machinery were consumed. They did not delay to give time for uncoupling the hose, which would have delayed them but a few minutes.

One of the grounds taken by the plaintiffs is, that the defendants train did not stop before crossing the Grand Junction Railroad, and thereby violated the General Statutes, chap. 63, § 93, which require that trains shall be stopped before crossing another railroad at grade. The point of this crossing was in sight of the fire, and a few hundred feet west of it. But the object of the statutes was solely to prevent the collision of trains at crossings, and had no reference to the extinguishment of fires. It is not applicable to this case.

The plaintiffs further contend, that the hose was properly and rightfully laid across the track, for the purpose of aiding in the extinguishment of the fire. This the defendants deny, because they had obtained a legal title to the land occupied by their railroad. It cannot be denied that it was their property, and they had the same right to its possession that other land owners have to their lands, so far as this case is concerned. But all rights of property are subject to some limitations. No one has a right to his real estate, which is absolutely exclusive. In *Cooley on Constitutional Limitations*, 594, it is said that police regulations may authorize one to take, use and destroy the private property of individuals, to prevent the spread of fire, the ravages of pestilence, the advance of a hostile army, or any other public calamity. See also the authorities there cited. But we have no occasion to consider the principle further than it is settled by this court in *Taylor v. Plymouth*, 8 Metc. 462. It is there held that the right to take private property to prevent the spread of fire exists by the common law. Chief Justice SHAW discusses the principle, and cites the authorities. We cannot doubt the soundness of the principle ; and it authorized the parties engaged in extinguishing the fire in the plaintiffs' factory to lay their hose across the defendants' track.

The elaborate provisions which our statutes have made for the extinguishment of fires indicate the magnitude of the interest which the community has in preventing the spread of conflagra-

Metallie Compression Casting Co. v. Fitchburg Railroad Co.

tions ; but these statutes do not supersede the common law. Their purpose is merely to enable the community to protect themselves more effectually than they could do otherwise. Thus the organization of a fire department with officers and implements does not deprive the people of a neighborhood from obtaining an engine and hose, and crossing the neighboring lands to obtain water for stopping a conflagration, without waiting for an organization; and individuals may climb upon neighboring roofs to carry buckets of water. It is a sufficient justification, that the circumstances made such an invasion of private property reasonable and proper, in helping to extinguish the fire.

The objection of the defendants, that the officers of the fire department in Cambridge had no jurisdiction in Somerville, and could not act officially in the town, has no validity. They had a fire company organized, and an engine and hose, and were in the vicinity of the building, and they could not with propriety stand idly by, and witness the spread of a fire which they might extinguish, merely because it was beyond the town line. They had a right, as citizens, to do what they reasonably could to prevent this public calamity, whether in their own city or a neighboring town.

It is urged that upon this principle one person may enter upon the property of another for the purpose of extinguishing a fire in a small building of no importance, and where there is no danger to other buildings. Undoubtedly the principle is to have a reasonable limitation. He who enters upon the property of another takes upon himself the burden of establishing the fact that there was a just occasion for it; and in this case the plaintiffs must submit to the jury, with proper instructions, the question whether there was good cause for laying the hose across the defendants' track. All that the court can say is, that there is sufficient evidence to submit to the jury.

But assuming that the hose was properly laid across the track, yet the defendants contend that the plaintiffs have no cause of action, because the hose was not their property, nor were the men who had possession of it their servants. It is true that the hose was not their property, and the men in charge of it were not their servants. Their services were voluntary, and if they had gone away and taken the hose and engine with them, the plaintiffs would have had no legal claim against them. But we do not think that these circumstances are material. The men and the engine were in fact

Metallic Compression Casting Co. v. Fitchburg Railroad Co.

furnishing water to the plaintiffs, and were thereby extinguishing the fire. They were rendering the same service to the plaintiffs as if they were hired and were using the plaintiffs' hose. The defendants cut off the supply of water, and this was as really an interference with the plaintiffs' possession as if they held the possession under a deed, and as if the men were laboring under a contract. The interference was tortious.

It is further contended, that no direct or immediate injury was occasioned to the plaintiffs by the act of the defendants, but that the injury was occasioned by the fire directly, and by the defendants remotely. The question of proximate cause is often involved in difficulty, by reason of the endless variety of circumstances in which injuries may occur; and the cases on the subject are very numerous. A case which much resembles the present is *Atkinson v. Newcastle & Gateshead Water-works Co.*, Law R., 6 Exch. 404. The defendants were a company incorporated to erect water-works and supply water to the inhabitants, with the obligation to keep a certain head upon the fire plugs. They neglected to do this, and were thereby subject to a penalty. The plaintiffs' saw-mill and lumber-yard took fire; and in consequence of the defendants' neglect in respect to the head of water, the plaintiffs could not obtain a supply, and their property was burned. It was held that the defendants were liable, on the common-law principle stated in Com. Dig., Action on the Case, A. "Whenever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages." The defendants contended that the damages were too remote, but the court held otherwise. KELLY, C. B., significantly asked, "What kind of damage can be more a proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved?" Baron BRAMWELL remarked that it was the immediate consequence of the proximate cause. *Couch v. Steel*, 3 El. & Bl. 492, was cited as decisive of this principle. Among other cases illustrating the subject of direct consequences are *Scott v. Shepherd*, 2 W. Bl. 892; *Gilbertson v. Richardson*, 5 C. B. 502; *Lee v. Riley*, 18 C. B. (N. S.) 722; *Dickinson v. Boyle*, 17 Pick. 78; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64.

Other cases are cited where the damages were held to be too remote, but they are unlike the present case. The law regards practical distinctions, rather than those which are merely theoret-

ical; and practically, when a man cuts off the hose through which firemen are throwing a stream upon a burning building, and there upon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury.

It is further contended that the advantage to be gained by the plaintiffs from the supply of water through the hose was merely prospective, and thus was remote. But it was not prospective, in the sense in which that word is used in the cases cited by the defendants. In respect to the extinguishment of the fire, the advantage was immediate.

It is further contended that the railroad company owed no duty to the plaintiffs in a case like this. It may be true that the company owed the plaintiffs no active duty; but it cannot be doubted that they owed the negative duty of forbearing to do an unlawful act which caused an injury. And the defendants are responsible for the act of their agents who had the control of the train. This principle is too well settled to require discussion.

Case to stand for trial.

INHABITANTS OF WATERTOWN V. MAYO.

(100 Mass. 315.)

Constitutional law—Police power—restraining nuisances in cities and towns.

A statute prohibited the use, in cities and towns of a certain size, of any building not then so in use, for carrying on the "business of slaughtering cattle, sheep, or other animals, or for melting or rendering establishments, or for other noxious and offensive trades or occupations," without the permission of the mayor, etc. *Held*, a constitutional exercise of the police power of the legislature.

BILL by the selectmen of Watertown, in behalf of the inhabitants, to restrain Mayo from occupying and using a certain building in Watertown for the purposes of slaughtering cattle, sheep, or other animals without the written consent of the selectmen, in violation of chap. 167, Stat. 1871.*

* The following is the act referred to:

SECTION 1. Whoever in any city or town containing more than four thousand inhabitants, erects, occupies or uses any building for carrying on therein the business of slaughtering cattle, sheep or other animals, or for melting or rendering establish-

Inhabitants of Watertown v. Mayo.

The answer denied the right of the plaintiffs to bring the suit; admitted ownership of the building and the carrying on of the business alleged, but claimed that the business was not a public or private nuisance, and that the said statute was unconstitutional.

At the hearing, before WELLS, J., it appeared that in September, 1871, the defendant made additions to the building, and began therein the business of slaughtering cattle, sheep and other animals. There was conflicting evidence whether he had previously slaughtered animals on the premises, but the judge found as a fact, that at the time the statute took effect the premises were not occupied or used for carrying on therein the business of slaughtering cattle, sheep or other animals. It also appeared that the premises were in the immediate vicinity of several dwelling-houses occupied as such; and that the noise and bleating of the animals on the premises was

ments, or .or other noxious or offensive trades and occupations, or permits or allows said trades or occupations to be carried on upon premises owned or occupied by him or them, without first obtaining the written consent and permission of the mayor and aldermen or selectmen of such city or town, shall forfeit a sum not exceeding two hundred dollars for every month he or they so occupy or use such building or premises, and in like proportion for a longer or shorter time: provided, that the terms of this section shall not apply to any building or premises now occupied or used for the trades or occupations before described; but no person or persons or corporation now occupying or using any building or premises for the trades or occupations aforesaid, shall enlarge or extend the same without first obtaining the written consent and permission of the mayor and aldermen or selectmen of the city or town in which such building or premises are situated, in the manner provided in this section.

'SECTION 2. Whenever in any city or town, containing more than four thousand inhabitants, any building or premises are occupied or used by any person or persons or corporation for carrying on the business of slaughtering cattle, sheep or other animals, or for melting or rendering establishments, or for other noxious or offensive trades, the State board of health may, if in their judgment the public health or the public comfort and convenience shall require, order any person or persons or corporation, carrying on said trades or occupations, to desist and cease from further carrying on said trades or occupations in such building or premises; and any person or persons or corporation continuing to occupy or use such building or premises for carrying on said trades or occupations after being ordered to desist and cease therefrom by said board, shall forfeit a sum not exceeding two hundred dollars for every month he or they continue to occupy and use such building or premises for carrying on said trades or occupations after being ordered to desist and cease therefrom by said board as aforesaid, and in like proportion for a longer or shorter time: provided that, on any application to said board to exercise the powers in this section conferred upon them, a time and place for hearing the parties shall be assigned by said board and due notice thereof given to the party against whom the application is made, and the order herein before provided shall only be issued after such notice and hearing.

"SECTION 3. The supreme judicial court, or any one of the justices thereof, in term time or vacation, shall have power to issue an injunction to prevent the erection, occupancy, use, enlargement or extension of any building or premises occupied or used for the trades or occupations aforesaid without the written consent and permission provided in section one of this act being first obtained; and also in like manner to enforce the orders of the State board of health issued under section two of this act."

Inhabitants of Watertown v. Mayo.

heard in them; but no other evidence was offered to show that the defendant's business was a public or private nuisance.

It was admitted that both before and ever since the passage of the statute, Watertown contained more than four thousand inhabitants; but it did not appear that the selectmen had special authority by any vote of the inhabitants to file or maintain the bill in their behalf.

The judge ordered and decreed that a perpetual injunction be granted against the defendant, as prayed for; and the defendant appealed.

G. A. Somerby, for defendant.

J. B. Goodrich (*H. J. Edwards* with him), for plaintiffs.

COLT, J. The business which the defendant carries on in his slaughter-house, without the written consent and permission of the selectmen of Watertown, is in plain violation of the provisions of the Stat. 1871, chap. 167, which prohibit the use of any building for slaughtering cattle, etc., or for other noxious or offensive trades, without such consent, in any city or town containing more than four thousand inhabitants. It is found that the defendant's business was commenced since the passage of the act; and it therefore does not come within the protection of the proviso in the first section, in favor of buildings and premises previously occupied for such business. The defendant relies upon the invalidity of the statute on constitutional grounds; and denies that the selectmen of Watertown have any interest in the subject-matter, or any right, in behalf of themselves or of the inhabitants of that town, to bring this suit.

All rights to the use and enjoyment of property, secured by the constitutions of the United States or of this commonwealth, are subject to regulation under that power known as the police power of the State, which, like the power of taxation, is necessary to its existence, and which is implied in the idea of free civil government. It is defined by Blackstone to be that power which concerns "the due regulation and domestic order of the kingdom, whereby the individuals of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent,

Inhabitants of Watertown v. Mayo.

industrious and inoffensive in their respective stations." 4 Bl. Com. 162. It has its foundation in that maxim of all well-ordered society, which requires every one to use his own so as not to injure the equal enjoyments of others having equal rights of property.

Laws passed in the legitimate exercise of this power are not obnoxious to constitutional provisions, although in some measure interfering with private rights, merely because they do not provide compensation to the individual whose liberty is restrained. He is presumed to be rewarded by the common benefits secured. It differs from the right of eminent domain, which involves the appropriation of private property to public use, and requires, in its lawful exercise, pecuniary compensation for the loss inflicted on the owner. Familiar instances of its exercise are found in all quarantine and fire regulations; and it has been repeatedly recognized and variously applied in the decisions of this court. *Commonwealth v. Alger*, 7 Cush. 53; *Fisher v. McGirr*, 1 Gray, 1; *Commonwealth v. Tewksbury*, 11 Metc. 55; *Baker v. Boston*, 12 Pick. 184; *Vandine, petitioner*, 6 id. 187.

To a great extent the legislature is the proper judge of the necessity for the exercise of this restraining power. It is not easy to prescribe its limit. The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen. But a perversion of this power is not shown by the fact that the business restrained is a necessary and lawful business, which has not yet become a public nuisance in fact, or been declared to be such by the statute. The law most wisely interferes for the protection of the public by preventing in advance threatened and probable injury. Exposure to danger is itself an injury.

Nor as a police regulation is it essential that its provisions should be applicable to all parts of the commonwealth. Density of population is itself an element which may increase the danger to be provided against, and which in any locality may justify the interference of the legislature and relieve it from the objection that its action is partial and unequal. The same rule is provided for all, to be applied only where from the surrounding circumstances there is the same exposure. *Commonwealth v. Alger*, 7 Cush. 53; *Baker*

v. *Boston*, 12 Pick. 184; *Austin v. Murray*, 16 id. 121; *Coates v. New York*, 7 Cow. 585, 604.

There is nothing in the declared purposes and provisions of the statute in question, which leads us to doubt that it comes within the constitutional exercise of the legislative power. It appears to us to provide, by legal modes, through the agency of local authorities, for a prudent restraint upon a use of property which from its nature may become injurious.

The remaining objection goes to the right of the selectmen, for themselves or in behalf of the inhabitants of Watertown, to maintain this bill. This objection, as stated in the answer, does not go to the authority in fact of the selectmen to represent the town in this matter, but denies the right of either the selectmen or the town to maintain a bill of this character.

But the right of the inhabitants of a town, in a case like this, to apply to this court for relief, and to prosecute the suit as plaintiffs, was recognized in the recent case of *Winthrop v. Farrar*, 11 Allen, 398. In that case, the selectmen of a town, acting as a board of health, brought a bill in equity to restrain the exercise of an offensive trade which they had prohibited under the Gen. Stats., chap. 26, and an amendment was allowed substituting the inhabitants of the town as plaintiffs after the term of office of the selectmen had ceased.

The statute of 1871, chap. 167, and the General Statutes, chap. 26, relate to the same subject-matter, the restraint of offensive trades. Power is given to the court under the later statute, in section 3, to prevent, by injunction, the erection, use or enlargement of buildings in violation of its provisions; and in the absence of any positive provision, it is to be presumed that it was not the intention to take from towns the power which they had exercised, by the decision of this court, to prosecute suits in similar cases.

Decree affirmed.

COMMONWEALTH V. LOCKWOOD.

(100 Mass. 222.)

Pardon — Constitutional construction.

The constitution of Massachusetts placed in the governor the power of pardoning offenses, but provided that no pardon before conviction should avail the party pleading the same. *Held*, that a pardon granted after verdict of guilty and before sentence was valid.

INDICTMENT for cheating by false pretenses. Defendant was tried at the May term of the Suffolk superior court, was found guilty by the jury, and exceptions taken by defendant to the decisions and rulings of the trial judge were allowed.

While the exceptions were pending in this court and before argument, the defendant went into the superior court and there pleaded a pardon granted by the governor of Massachusetts by and with the advice of the council, on December 8, 1871.

The district attorney, in behalf of the commonwealth, replied that the pardon was granted "while the exceptions were pending and undecided as aforesaid, and before any judgment on said verdict was or had been rendered by said superior criminal court or any conviction had on said indictment, and was and is null and void." The defendant demurred to the replication; and LORD, J., reported the case for the determination of this court as follows:

"By consent of the parties, I report for the determination of the supreme judicial court, whether said pardon can be pleaded in bar of sentence upon said indictment; and, whether it can or cannot be pleaded, what is the legal effect of the pleading in the case. It was agreed between the parties, that the exceptions to the rulings and decisions of the superior court were pending at the time the pardon was issued; and that said exceptions were subsequently waived, and the pardon pleaded, as appears by the record. The commonwealth's attorney contended that, under the constitution of the commonwealth, the governor cannot pardon till conviction is established by the judgment of the court upon a verdict of guilty; that at all events, even if the executive may interpose his pardon before sentence, it can only be when nothing of judicial proceeding remains except sentence, when the right of the govern-

ment to move for sentence is judicially determined; and that under no circumstances whatever can a pardon be issued while there remains undecided a judicial question, upon which conviction and sentence depend. On the part of the defendant, it was contended that the power and right of the governor to pardon is absolute upon the rendition of a verdict of guilty by the jury, and, whether so or otherwise, the defendant is entitled upon the pleadings to be discharged."

G. A. Somerby and W. S. Gardner (T. H. Sweetser with them),
for defendant.

J. W. May, district attorney, for Commonwealth.

GRAY, J. This case presents an interesting question of the extent of the power conferred by that provision of the constitution of the commonwealth, which declares that "the power of pardoning offenses, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council; but no charter of pardon, granted by the governor, with advice of the council, before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offense or offenses intended to be pardoned." Const. Mass., chap. 2, § 1, art. 8.

The nature of this question, involving a definition of the limits of the constitutional authority of the executive department of the government, and the doubts which some of us at first entertained in relation to it, justify, if they do not require, a full statement of the reasons and precedents for the conclusion at which, upon mature consideration, we have unanimously arrived.

The ordinary legal meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while "judgment" or "sentence" is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. The authorities upon this point are so numerous that it will be sufficient to cite a few of those which show that such was

the legal understanding and use of these words at the time of the adoption of our constitution.

Upon a question of the meaning of legal language as used at that time, there is no higher authority than Blackstone's Commentaries, which were published in 1765, and of which Edmund Burke, in his speech on conciliation with the colonies, in 1775, said that he had heard that nearly as many copies had been sold in America as in England.

Blackstone uniformly speaks of the verdict of a jury upon a plea of not guilty as constituting the "conviction," even while the case is still open to a motion for a new trial or in arrest of judgment. After discussing the granting of a new trial when the accused has been found guilty by the jury, and the conclusive effect of an acquittal, he adds: "But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted; which conviction may accrue two ways, either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country." 4 Bl. Com. 362. "After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance, of which the principal is the benefit of clergy." Id. 365. "We are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors as are either too high or too low to be included within the benefit of clergy, which is that of *judgment*." "Whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exception to the indictment, in arrest or stay of judgment." Id. 375. After describing the effect of "sentence of death, the most terrible and highest judgment in the laws of England," as attainting the criminal, and incapacitating him to be a witness, or to perform the functions of another man, he observes: "This is after *judgment*, for there is great difference between a man *convicted* and *attainted*, though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities, for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon or be allowed the benefit of clergy." Id. 380, 381. "When judgment, pro-

nounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside." Id. 393. "General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony, but the conviction or attainder must be particularly mentioned." Id. 400. "A pardon may either be pleaded upon arraignment, or in arrest of judgment, or in bar of execution." Id. 402. The terms of our constitution clearly indicate that its framers had in mind these rules of the common law.

The word "conviction" was used in the same sense in many public acts of the government of this State, after it had thrown off the authority of the crown, and before the adoption of the constitution of the commonwealth. By Stat. 1776, chap. 32, § 18, it was provided that "no miswriting, misspelling, false or improper English after conviction" upon an indictment for treason should "be any cause to stay or arrest judgment thereupon." By Stat. 1776, chap. 44, § 1, any person offending against the act of 1775, chap. 9, to prevent the forgery of bills of public credit, "and being thereof convicted as in said act provided, shall be adjudged guilty of felony and suffer the pains of death." By Stat. 1776, chap. 48, § 3, any person transported out of the State as a public enemy, and returning during the war without license of the general court, should, "on conviction thereof before the superior court of judicature, be adjudged guilty of felony, without benefit of clergy." And by the Stat. of January 25, 1779, chap. 3, any inhabitant of this State, committing treason without the limits thereof, might be tried therefor in the county whereof he was an inhabitant, and, "if thereof convicted in the same county, be adjudged and punished in the same manner as if the said offense had been therein committed." Mass. State Laws, 1775-1780, pp. 110, 127, 136, 211. The death warrants of the same period, issued by the council exercising the executive power, preserve the same distinction between conviction by the jury and judgment of the court. For example, the warrant for the execution of Bathsheba Spooner and others for the murder of her husband in Worcester in 1778, recites that the defendants "were by verdict of our said county of Worcester convict, and thereupon were by our justices of our said court adjudged to suffer the pains of death." 2 Chandler's Crim. Trials, 378.

The first crimes act of the United States begins with these words: "If any person or persons, owing allegiance to the United States

of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death." U. S. Stat. 1790, chap. 35, § 1. Section 31 of the same act declares that "the benefit of clergy shall not be used or allowed upon conviction of any crime for which, by any statute of the United States, the punishment is or shall be declared to be death." And our own Stat. of 1784, chap. 56, § 2, provided that "if any person shall be convicted of any crime wherein by law the plea of benefit of clergy was heretofore allowed, and for which, without such benefit of clergy, he must have been adjudged to suffer the pains of death," he should be otherwise punished as therein prescribed. See also Stats. 1782, chap. 9, § 1; chap. 14, § 3; 1784, chap. 9, § 4; chaps. 46, 52, 58; chap. 66, § 11; chap. 68.

Mr. Dane, who was admitted to the bar before the adoption of the constitution, and was peculiarly learned in the law of his times, says: "A man is convict by verdict, but not attainted before judgment." "Pardon is another special plea in bar." "By pleading a pardon in arrest of judgment, there is an advantage, as it stops the corruption of blood, by preventing the attainder." "Conviction is on confession or verdict." 6 Dane's Ab. 534, 536. See also 7 id. 339, 340.

In *Commonwealth v. Richards*, 17 Pick. 295, it was held that an appeal allowed by statute from the court of common pleas in a criminal case, to be claimed at "the court before which such conviction shall be had," must be claimed before the end of the term at which the verdict was returned; and Chief Justice SHAW, in delivering the opinion of the court, said: "It has generally been considered, we believe, that, as the sentence is the final act in a criminal proceeding, it constitutes the judgment, and it is only from final judgments that appeals are to be taken. But though such is the general rule of law, we think it has been changed by this statute, and that the statute itself has made a distinction between a conviction and a judgment. In general, the legal meaning of 'conviction' is, that legal proceeding of record, which ascertains the guilt of the party, and upon which the sentence or judg-

ment is founded, as a verdict, a plea of guilty, an outlawry, and the like." See also *Commonwealth v. Andrews*, 2 Mass. 409, and 3 id. 126, 131, 133.

The use of words in our modern statutes is not the highest evidence of their meaning at the time of the adoption of the constitution. But it may be observed that the Rev. Stats., chap. 123, § 3, and the Gen. Stats., chap. 158, § 5, provide that "no person indicted for an offense shall be convicted thereof, unless by confession of his guilt in open court, or by admitting the truth of the charge against him by his plea, or demurrer, or by the verdict of a jury accepted and recorded by the court." It is by the defendant's own confession, plea or demurrer, or by the verdict, that he is here declared to be "convicted," without any action of the court in either alternative, except in the latter, the mere formal acceptance and recording of the verdict, which implies no adjudication of the court upon the defendant's guilt. See, also, Rev. Stats., chap. 137, § 11, and Gen. Stats., chap. 172, § 16; Rev. Stats., chap. 139, and Gen. Stats., chap. 174, *passim*.

When indeed the word "conviction" is used to describe the effect of the guilt of the accused as judicially proved in one case, when pleaded or given in evidence in another, it is sometimes used in a more comprehensive sense, including the judgment of the court upon the verdict or confession of guilt; as, for instance, in speaking of the plea of *autrefois convict*, or of the effect of guilt, judicially ascertained, as a disqualification of the convict. And it might be held to have the same meaning in the somewhat analogous case in which the constitution provides that "no person shall ever be admitted to hold a seat in the legislature or any office of trust or importance under the government of this commonwealth, who shall in the due course of law have been convicted of bribery or corruption in obtaining an election or appointment. Const. Mass., chap. 6, art. 2. See *Case of Falmouth*, Mass. Election Cases (ed. 1853), 203.

But Blackstone says: "The plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment." 4 Bl. Com. 336. And it is still an open question in this commonwealth, whether a verdict of guilty rendered upon a good indictment, and which has not been set aside, will or will not, before judgment,

support a plea of *autrefois convict*. 6 Dane's Ab. 533; *Commonwealth v. Roby*, 12 Pick. 496, 510; *Commonwealth v. Lahy*, 8 Gray, 459, 461; *Commonwealth v. Harris*, id. 470, 473.

At the time of the adoption of the constitution, the word "conviction" was ordinarily used to express the verdict only, even in treating of the disqualification of the convict as a witness. Lord MANSFIELD, for example, in 1774, where a witness was objected to as incompetent because he stood convicted of perjury, the record of which conviction was produced, said: "A conviction upon a charge of perjury is not sufficient, unless followed by a judgment; I know of no instance in which a conviction alone has been an objection." *Lee v. Gansel*, Cowp. 1, 3. In the earlier cases in this commonwealth, the word "conviction" was used in the same sense as applied to such a question, even before it had been settled whether a judgment was necessary to complete the disqualification of the witness. Upon the trial in this court in 1788 of an indictment against two for perjury, to which one pleaded guilty and was offered as a witness for the commonwealth against the other, Mr. Justice (afterward Chief Justice) DANA states in his manuscript note of the case, "To whom it is objected that, standing convict of the *crimen falsi*, he is disqualified to be a witness. It is answered that conviction, though of the *crimen falsi*, is no disqualification, without it be followed by an infamous punishment, or at least until after judgment." The witness was excluded by a divided court. *Commonwealth v. Manly and Willis*, Bristol, October term, 1788. So in *Crushman v. Loker*, 2 Mass. 106, the court said, "It is now settled that nothing short of a conviction on an indictment for *crimen falsi*, and a judgment on the conviction, "is a sufficient objection to the competency of a witness." And in the latest case on that subject, in which it was held that a verdict, without judgment, was not such a "conviction" as could be proved under Gen. Stats., chap. 131, § 13, in order to affect the credit of a witness, it was said: "In its most common use, it signifies the finding of the jury that the prisoner is guilty." *Commonwealth v. Gorham*, 99 Mass. 420.

It was argued by the learned attorney for the commonwealth, that the words of the constitution, that no pardon granted before conviction "shall avail the party pleading the same," imply that it cannot be taken advantage of after verdict in the first prosecution for the offense in question, because the time for pleading is then past. But "pleading," as here used, may well include any suita-

ble form of bringing the pardon to the notice of the court, by plea, motion or otherwise. Coke, Holt, Mansfield and Blackstone, all speak of "pleading" a pardon after the verdict and even after the judgment. 3 Inst. 235; *Rez v. Parsons*, 1 Freem. 507; *The King v. Beeton*, 1 W. Bl. 479; 4 Bl. Com. 337, 376, 402. In at least one instance before the superior court of judicature of the Province of Massachusetts Bay, a man who had been indicted for murder and found guilty by the jury, and his case continued from term to term, upon a motion for a new trial, until he had obtained a pardon from the king, was then, as the record states, "brought again into court, and, being set to the bar, upon his knees he pleads his majesty's most gracious pardon of the offense aforesaid, a certificate of which from the secretary of state's office, being produced, is allowed." *The King v. Richardson*, Rec. 1772, fol. 15. And, as we shall presently see, there are many similar records since the adoption of the constitution.

It is not easy to ascertain the source of the constitutional restriction of the pardoning power. The acts of the English parliament contained no like provision; and the histories of Massachusetts, and such imperfect notes of the debates in the convention which framed the constitution of the commonwealth as have come down to us, are silent upon the subject.

The English bill of rights of 1688 declared "that all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void." Stat. 1 W. & M. sess. 2, chap. 2, § 12. That article did not affect the power of the sovereign to remit fines and forfeitures and pardon offenders; but was aimed at the illegal practice of granting away fines and forfeitures before they had actually accrued; and an inquest or inquisition of office by the jury was a complete conviction within the contemplation of the bill of rights. 3 Bl. Com. 259; 4 id. 301. By the common law, a conviction of felony by verdict or confession vested in the king the goods and chattels of the felon, although his lands were not forfeited until attainder by judgment. 4 Bl. Com. 373*, 387.

The house of commons in 1679, and again in 1688, resolved that a royal pardon could not be "pleaded in bar of an impeachment." 4 Hatsell's Prec. 192, 193, 277. And in 1700 the act of settlement of 12 & 13 W. III, chap. 2, section 3, declared "that no pardon under the great seal of England be pleadable to an impeachment by the commons in parliament." "But," Blackstone says, "after

the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged." 4 Bl. Com. 399. There is no doubt that the king can pardon after sentence upon an impeachment. 7 Parl. Hist. 283; 4 Hatsell's Prec. 296, note; 2 Hallam's Const. Hist., chap. 12 (7th ed.), 414. And the question of his power to pardon after a vote of guilty and before sentence does not appear to have arisen in England. But in proceedings upon impeachment before the house of lords since the statute of W. III, the plea or vote of guilty was considered the "conviction," and the sentence passed thereon the "judgment," as clearly appears in two cases of impeachment for high treason in the reign of George I, in which Lord Chancellor COWPER presided as lord high steward. In one of them, in 1715, the Earl of Derwentwater and five other lords having confessed the charge, Lord COWPER said: "You have severally pleaded guilty, and are thereby convicted. What say you" (addressing each of them by name successively) "why judgment should not pass upon you according to law?" 15 Howell's State Trials, 761, 791. In the other, in 1716, the Earl of Wintoun pleaded not guilty. Upon the trial the lords unanimously voted that he was guilty, and Lord COWPER announced to him that they had found him guilty, and asked him if he had any thing to offer why judgment of death should not pass upon him according to law. He then moved in arrest of judgment, and after argument of counsel upon that motion the lords retired, and on their return Lord COWPER, in passing sentence of death, addressed him as follows: "George, Earl of Wintoun, I have already acquainted you that your peers have found you guilty, that is, in the terms of the law, convicted you of the high treason whereof you stand impeached. After your lordship has moved in arrest of judgment, and the lords have disallowed that motion; their next step is to proceed to judgment." Id. 805, 874, 893. In 1747, Lord Hardwicke, presiding at the trial of Lord Lovat on a like impeachment, used similar words. 18 id. 529, 837.

The Federal constitution, like that of this commonwealth, wholly excepts cases of impeachment out of the executive power of pardon. Const. U. S., art 2, § 2; 3 Madison's Debates, 1433. But both constitutions, and the highest authorities upon the subject, recognize the like distinction between "conviction" and "judgment" in cases of impeachment, as in cases tried before a court and jury. The constitution of Massachusetts provides that the senate shall hear

and determine all impeachments; that "their judgment" shall not extend further than to the removal from office and disqualification to hold or enjoy any place of honor, trust or profit under this commonwealth; "but the party so convicted shall be nevertheless liable to indictment, trial, judgment and punishment according to the laws of the land." Const. Mass., ch. 1, § 2, art. 8. The constitution of the United States provides that all impeachments shall be tried by the senate; that "no person shall be convicted without the concurrence of two-thirds of the members present;" and that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law." Const. U. S., art. 1, § 3. Mr. Justice STORY, in his Commentaries on the Constitution, says: "In England, the judgment upon impeachments is not confined to mere removal from office; but extends to the whole punishment attached by law to the offense. The house of lords, therefore, upon a conviction, may, by its sentence, inflict capital punishment; or perpetual banishment; or forfeiture of goods and lands; or fine and ransom; or imprisonment; as well as removal from office, and incapacity to hold office; according to the nature and aggravation of the offense." And again, in speaking of the more complete restriction of the president's power of pardon, in cases of impeachment, than of the king's, he says: "As the judgment upon a conviction extends no farther than to a removal from office, and disqualification to hold office, there is not the same reason for its exercise after the conviction, as there is in England." Story on Const. U. S., §§ 782, 1496. In the trial of President Johnson, the rules of the court of impeachment provided that "if the impeachment shall not, by any of the articles presented, be sustained by the vote of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused shall be convicted upon any of said articles by the votes of two-thirds of the members present, the senate shall proceed to pronounce judgment." And accordingly, after the vote had been taken, and declared by the chief justice, showing that two-thirds of the members present had not found the president guilty, and that he was therefore acquitted, the chief justice said, "That is not the judgment of the senate;"

and, after debate, a judgment of acquittal was unanimously ordered to be entered. 1 Johnson's Trial, 14; 2 id. 497, 498.

But the effect of the provision of the constitution of Massachusetts, as applicable to ordinary criminal cases, is not now to be determined for the first time by the meaning of its words, or by any analogy to be drawn from cases of impeachment in England or America. It is practically settled by the action of the highest executive and judicial authorities of the commonwealth, reaching back to the time of the adoption of the constitution, and proved by the records of the governor and council and of this court.

At November term, 1780, in Essex, Sargent Daniels was tried and found guilty of manslaughter, and, upon motion of his counsel, the court ordered that sentence be respited, and that he be bailed, and the case was continued until November term, 1781, "for judgment; and now the said Sargent Daniels, being again brought into court and set at the bar, is asked by the court if he has any thing to say why sentence of death should not be given against him, pleads the gracious pardon of his excellency John Hancock, Esquire, with the advice of counsel, of the offense aforesaid, under the public seal of the commonwealth of Massachusetts, bearing test the 5th day of November, A. D. 1781, which being produced and read in court, is allowed. It is therefore considered by the court, that the said Sargent Daniels go without day." Rec., 1781, fol. 128. The charter of pardon in that case, a copy of which has been laid before us, recites that the defendant, "an infant," had been "convicted of manslaughter: Whereupon the said court suspended the sentence against the said Sargent by reason of his being of very tender years."

At April term, 1787, in Hampshire, Timothy Hinds was indicted for treason against the commonwealth, and pleaded guilty, and the indictment was continued until September term, 1787, for sentence. "And now the said Timothy is set to the bar, and it being demanded of him what he hath to say wherefore sentence of death should not be passed upon him for the crime of treason of which he stands convicted, says that since the time of his conviction of the crime alleged in said indictment, to wit, on the eleventh day of May, in the year of our Lord seventeen hundred and eighty-seven, his excellency, James Bowdoin, Esquire, then governor of the commonwealth, by and with the advice of the council of said commonwealth, granted to him, the said Timothy, under the seal of the

commonwealth, a full, free and complete pardon of the crimes in said indictment alleged, and of all pains and penalties therefor, which same charter of pardon the said Timothy here produces and exhibits to the court, and prays that the same may be allowed, which is in the words following:” [setting it out in full] “all which being seen and fully understood, it seems to the court here that the plea of the said Timothy as above in pleading alleged, and the pardon by him now produced, are good and sufficient in law. It is, therefore, considered by the court that the said Timothy go without day.” Rec., 1787, fol. 241.

The judges present, when these cases were decided, appear by the records to have been Chief Justice CUSHING, and Justices SARGENT and DAVID SEWALL, in both cases, together with Justice SULLIVAN in the first case, and Justice SUMNER in the second. All these judges, as well as Governor Hancock and Governor Bowdoin, had been members of the convention which framed the constitution of the commonwealth.

A report of another case is preserved among the manuscripts of Chief Justice DANA. At November term, 1803, in Suffolk, Deborah Stevens was indicted for the murder of her bastard child by drowning. At the trial, before Justices STRONG, SEDGWICK and THACHER, there was evidence that the child had been alive a short time before it was thrown into the water, and was there found dead the next day, with a bruise upon its head and a string tied about its neck. It was argued by the counsel for the prisoner, that the death of the child might have been caused either by the blow on the head, or by being strangled by the string about its neck, before being thrown into the water; and so not by drowning. Justices STRONG and SEDGWICK (THACHER, J., dissenting) instructed the jury “that if they were convinced a murder had in fact been committed by the prisoner upon the child, and only doubted as to the means of the death, they might lawfully convict the prisoner, unless from the evidence they were satisfied that it was dead before it was thrown into the water by the prisoner.” The defendant being found guilty by the jury, a motion was made in her behalf “for a suspension of judgment in order to obtain a request from the court to the supreme executive to issue a charter of pardon in her favor.” The result of this motion is stated by the chief justice in these words: “The court, after argument by the attorney-general and counsel for the prisoner, suspended sentence against the prisoner,

and recommended her to the governor as a subject of mercy. Three of the court, viz., DANA, SEWALL and THACHER, were of this opinion on account of the direction in matter of law of SEDGWICK and STRONG to the jury, the two justices who sat on the trial together with THACHER—STRONG and SEDGWICK adhering to their direction as given to the jury."

At April term, 1808, in Worcester, David Potter was indicted for larceny, and pleaded guilty, and the indictment was continued for sentence. At September term following, held by Chief Justice PARSONS, and Justices SAMUEL SEWALL and ISAAC PARKER (successively chief justices of this court), the defendant, being set to the bar, pleaded "that sentence on the conviction aforesaid ought not to be passed upon him," because, "after the conviction aforesaid," the governor, with the advice of the council, had granted to him a charter of pardon, which he produced and prayed might be allowed by the court. "All which being seen and understood by the court here, it is considered by the court that the said David Potter be discharged and go without day." Worcester Rec. 1808, fol. 540.

About the same time, John Waite, having been indicted for forgery in the county of Cumberland, now in Maine, but then part of this commonwealth, and found guilty, moved the court, as the report states, "to set aside the verdict on the ground that he was improperly convicted." The grounds of the motion were, that the defendant had since obtained evidence of confessions of the principal witness against him, which showed him to have been incompetent; and that, if he was competent, the defendant now had evidence further to discredit him. Chief Justice PARSONS, in delivering the opinion of the court upon this motion, said: "In the trial of offenses, but a small part of the trial is intrusted to the judges. The offender's peers are to pass on him; and to set aside a verdict merely at our discretion, and not on grounds which the law considers as sufficient, would be an arbitrary interference in judicial proceedings, and a violation of the important rights of jurors. "If there are any equitable or humane causes for relief, they belong not to us, but to the executive. Sentence must be passed on the verdict." To which the reporter adds, in a note, "The sentence being respited, the defendant received a pardon from the governor and council, which, being produced at the next term of the court, was allowed, and the defendant discharged, *ut audiri*." Common-

Commonwealth v. Waits, 5 Mass. 261. A certificate of that pardon, from the office of the secretary of the commonwealth, was produced at the argument of the present case.

At April term, 1807, in Middlesex, Joel Brown was tried before SEDGWICK, J., and found guilty of larceny, and moved for a new trial for misdirection of the judge to the jury. The case was continued to November term, 1809, when, after argument upon this motion, SEDGWICK, J., said, "The conviction, I think, was right," and the other judges concurring, a new trial was refused. *Commonwealth v. Brown*, 4 Mass. 580. Before any further judgment or sentence, the defendant obtained and pleaded a pardon from the executive, and was thereupon discharged by the court. Middlesex Rec. 1810, fol. 6.

The published reports afford other instances in which, after overruling motions for a new trial and in arrest of judgment, or exceptions taken by the defendant at the trial, the court has suspended final judgment and sentence to await the effect of an application of the defendant to the governor for a pardon. *Commonwealth v. Ladd*, 15 Mass. 526; *Commonwealth v. Mash*, 7 Metc. 472, 475.

Even when no judgment whatever has been rendered, and no action had by the court after the acceptance and recording of the verdict, no instance has been found in which a pardon granted after verdict has been disputed or disallowed. And our records show that in very many cases, upon the production of a pardon granted by the executive at that stage, the court has discharged the defendant. It will be sufficient to add one more case to those already cited.

At September term, 1811, in Worcester, held by PARSONS, C. J., SEDGWICK, SEWALL and PARKER, JJ., Frederick Carpenter, who had been indicted for uttering as true a forged and counterfeit paper, and pleaded not guilty, and been found guilty by the jury, and afterward, being set to the bar, pleaded "that no judgment ought to be rendered on the said verdict," because the governor and council had since granted him a pardon, "wherefore he prays that judgment on said verdict may be arrested, and he may be thereof discharged and permitted to go without day. Which being seen and fully understood by the court, it is thereupon ordered that the said Frederick Carpenter be discharged and go thereof without day." Worcester Rec. 1811, fol. 409.

In *Commonwealth v. Green*, 17 Mass. 515, in 1822, in which the power of the court to grant a new trial in a capital case on motion of the defendant after conviction by the jury was deliberately settled for the first time in this commonwealth, upon full argument and advisement, Chief Justice PARKER, in delivering judgment, clearly affirmed the authority of the court, upon being satisfied of an error in the rulings of the trial, to certify the fact to the executive and recommend a pardon, instead of granting a new trial; and declared that the latter course was the most proper, not from any doubt of the power of the executive to grant a pardon at that stage of the case, but because it was more consistent with public justice that the defendant should be tried again according to law than that he should be discharged for some irregularity perhaps not affecting the merits of the case, and more consistent with the rights of the defendant to have the judges correct an error committed by themselves or by others concerned in the trial, "instead of being obliged to rely upon the disposition of the court to recommend a pardon, or of the executive power to grant it." 17 Mass. 535, 536.

If the words of the constitutional provision could be deemed ambiguous, their interpretation must be held to be settled by the contemporaneous construction and the long course of practice in accordance therewith. *Stuart v. Laird*, 1 Cranch, 299, 309; *Edwards v. Darby*, 12 Wheat. 206, 210; *Commonwealth v. Parker*, 2 Pick. 549, 556.

It was argued for the commonwealth that the defendant could not be said to be convicted at the time when this pardon was granted, because a bill of exceptions was then pending in this court to the rulings under which he had been found guilty, and that after pleading the pardon he might still prosecute his exceptions, and, if they should be sustained, have the verdict set aside. But it is within the election of the defendant whether he will avail himself of a pardon from the executive (be the pardon absolute or conditional); if he does not plead the pardon at the first opportunity, he waives all benefit of the pardon; if he does so plead it, he waives all other grounds of defense. Staunf. P. C. 150; J. Kel. 25; 4 Bl. Com. 402; *United States v. Wilson*, 7 Pet. 150. The pleading of the pardon in the superior court would therefore be *ipso facto* a waiver of his exceptions. A still more conclusive answer to this objection is, that at the time of the adoption of the constitution,

and for many years afterward, no bill of exceptions was permitted by law. It was first given to the rulings of a justice of this court by Stat. 1804, chap. 105, § 5; and to the rulings of the court of common pleas, by Stat. 1820, chap. 79, § 5. The providing by the legislature of a new form of presenting questions of law to the court does not make the verdict of a jury, so long as it stands, less than a "conviction," and cannot abridge the prerogative of the executive under the constitution. *Ex parte Garland*, 4 Wall. 333, 380.

The necessary conclusion is, that, having regard to the ordinary legal meaning of the words used in the constitution at the time of its adoption, to the presumption which judiciary is always bound to make in favor of the validity of the acts of those intrusted with the highest authority in another department of the government, to the rule of interpretation in favor of the liberty of the subject, and to the practical construction given to this clause by the supreme executive of the commonwealth and by our predecessors in this court from the beginning, the pardon of the defendant is valid, and he must be

Discharged.

COMMONWEALTH V. KILLIAN.

(100 Mass. 345.)

Railroad — obstructing train.

Defendant was indicted, under a statute, for obstructing a railroad train and endangering the safety of the passengers. The evidence showed that he was a passenger on the train; that he pulled a signal rope attached to a bell upon the engine, thereby causing the train to be stopped, and the safety of the passengers to be endangered. *Held*, that the indictment was not maintained.

INDICTMENT, under a statute, for feloniously, willfully and maliciously obstructing the engine and carriages of the Boston and Providence Railroad Company, by pulling the signal rope attached to a bell upon the engine, by reason whereof the said engine and carriages were caused to be stopped, hindered and delayed, and the safety of the passengers endangered against the statute, etc.

The evidence tended to prove that the defendant was a pas-

senger on the train ; that he pulled the bell rope ; that the train was thereupon stopped ; that there was following the said train another train ; that the conductor of the first train was compelled to send back a man to flag the rear train to avoid a collision. It appeared that the defendant did not get off when he caused the train to be stopped ; that he had paid his fare to a point beyond, and that he was warned by a fellow-passenger not to pull the rope.

The defendant offered no evidence in his own behalf, but requested the judge to instruct the jury "that no crime had been proved against him by the evidence ; that the evidence was not sufficient to warrant a verdict against him ; and that no crime or offense known to the laws of this commonwealth had been proved against him." But the judge declined so to rule, and instructed the jury "that if they found that the defendant pulled the bell-rope of the train as alleged in the indictment, that was an obstruction within the meaning and intent of the statute." The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. O. Teale, for defendant.

C. R. Train, attorney-general, for Commonwealth.

COLT, J. Punishment is provided by the Gen. Stats., chap. 63, § 107, for whoever "obstructs any engine or carriage passing upon a railroad, or endangers the safety of persons conveyed in or upon the same, or aids or assists therein." The defendant is indicted for obstructing a train of cars by pulling the signal rope attached to a bell upon the engine, whereby the train was stopped and the safety of passengers endangered. There was evidence at the trial that the defendant was a passenger at the time of committing the offense charged, and that pulling the bell-rope was ordinarily used as a danger signal, and as notice to the engineer to stop the train. In the opinion of a majority of the court this evidence fails to prove a criminal obstruction of the train, within the reasonable meaning of the statute.

The law was not intended to apply to a case where the train is stopped by an engineer, or other person having control, in consequence of a false signal communicated in this manner by a passenger. That is a proper and a contemplated mode of stopping the

Pierce v. Dyer.

train, to be used in case of accident or necessity, not only by officers in charge, but by passengers; and the act, however improper, and whatever may be its motive, cannot be regarded as ordinarily or directly dangerous to any one. If the terms of the statute do not imply an actual physical obstruction, they at least require something more than the use of the agencies here employed.

The case of *The Queen v. Hadfield*, Law Rep., 1 C. C. 252, relied upon by the government, was under the English Stats. of 24 and 25 Vict., chap. 97, §§ 35, 36. The prisoner unlawfully altered some railway signals at a railway station. The alteration caused a train, which would have passed the station without slackening speed, to slacken speed and to come to nearly a stand; and another train going in the same direction and on the same rails was due at the station in half an hour. This was held by a divided court to be an obstruction within the meaning of section 36, which enacts that whosoever by any unlawful act, etc., obstructs any engine or carriage using any railway, shall be guilty of a misdemeanor. But section 35 of the same statute makes it felony to obstruct a train by certain unlawful acts there named, including the altering of signals, and it was thought that the acts specified were intended to be also included in section 36 by the phrase "any unlawful acts." The interpretation of our statute is not thus aided, and it cannot be thus enlarged.

Exceptions sustained.

PIERCE V. DYER.

(100 Mass. 374.)

Action — easements and servitudes as to several tenements in a building — neglect of one owner to repair.

The owner of one part of a building has no action to recover damages at law for the willful neglect of the owner of the other part in permitting his part to become ruinous and fall into decay, whereby the plaintiff's part is injured.*

ACTION in tort by Drusilla Pierce and another against Benjamin H. Dyer. The first count of the declaration alleged "that the

*See *Ottumway Lodge v. Lewis*, 11 Am. Rep. 125.

Pierce v. Dyer.

plaintiffs are, and were prior to the year 1870 and the defendant's tenure herein referred to, owners of a dwelling-house situated in Truro, in this commonwealth, and the defendant has been, to wit, since the year 1862, owner and possessor of a house adjoining the house of the plaintiffs; that the two tenements were built as and designed for one dwelling-house by the owner thereof; that there is no partition wall between the said two tenements or parts of said dwelling-house, but they are separated only by an imaginary line passing through the rooms thereof; and that, since the defendant's ownership, the defendant, designing to harm the plaintiffs and their property, has injured and permitted to be injured and to decay his tenement, till it became ruinous, the roof, sides and interior thereof, whereby the plaintiff's said house has been greatly damaged, and the plaintiffs have been unable to keep the same in any repair, through the wrongful acts of this defendant." The second count was as follows: "And the plaintiffs further say, that they and the defendant are and were owners as aforesaid of two several tenements in the town of Truro aforesaid; that said tenements adjoin each other as aforesaid, and originally formed one dwelling-house, held by one and the same owner; and that the defendant has wrongfully suffered his house to remain out of repair and to decay, and has neglected and refused to repair the same, whereby the interior of the plaintiff's house became exposed to storms of rain and wind, and said house suffered great damage and injury, the plaintiffs' windows and doors were shattered, the walls and ceilings damaged, the timbers of said house and flooring decayed, and said house has been otherwise greatly damaged." The defendant demurred, on the ground "that none of the acts or omissions charged upon him in said declaration can be the basis of an action by the plaintiffs against him." The superior court sustained the demurrer, and the plaintiffs appealed.

G. A. King, for defendant.

L. Knowles, Jr., for plaintiffs.

COLT, J. The plaintiffs' action, in both counts, is founded on the alleged right of the owner of one part of a dwelling-house to recover damages at law for the willful neglect of the other owner in permitting his part to become ruinous and fall into decay, whereby

the plaintiffs' house was damaged. The allegation of the first count, that the defendant "injured and permitted to be injured and to decay his tenement, till it became ruinous," must be construed to charge willful neglect to repair, and does not allege with sufficient distinctness any positive act of destruction or injury by the defendant. There is a wide difference between injuries which arise from negligence, and those which result from positive misfeasance; and if the latter were relied on as a ground of action, they should have been distinctly alleged. The second count plainly charges only wrongful neglect and refusal to repair.

It is to be assumed as settled, that, where two or more houses, so constructed as to require mutual support, are conveyed to different owners, or where separate portions of one dwelling become vested in different owners, a right of support, as incident to the property, passes by the conveyance to each grantee, unless excluded by the terms of the grant. *Richards v. Ross*, 9 Exch. 218. Easements of this description are acquired by grant; but, in construing the conveyance, it is to be presumed that the parties intended to preserve the obviously existing relations and dependencies of the estate, and all those incidents necessary to the present enjoyment of the thing granted are held to pass. There is an obligation upon each adjacent proprietor in favor of the other, beyond what is implied in the maxim which requires every one to use his own so as not to injure his neighbor. The exclusive dominion of each is so far qualified, that neither can take away the support of the other, however prudent and careful on his part the act may be.

It is argued that the right of support and shelter, to which the purchaser of one part of a dwelling thus becomes entitled, and which may not be taken away by any wrongful act of the other owner, imposes also the active duty to repair the premises and maintain the existing condition of things.

The nature, extent, and duration of the servitudes, thus imposed by implication upon each adjoining estate, are not well defined in the reported cases. As a restriction upon the free use of property conveyed in fee, the right is not to be extended beyond apparent necessity. Upon principle, the extent of the burden imposed must be limited by the presumed intention of the parties, having regard to the relations and dependencies of the two estates, and the changes which may reasonably be expected to take place. It is to be considered that the necessity which lies at

Pierce v. Dyer.

the foundation of the right arises from the existing relations of artificial structures, for the time being constituting part of the freehold, but liable to be destroyed by the action of the elements or by mere lapse of time. When thus destroyed, it is fair to presume that the parties intend, in the absence of any agreement, that the easement shall end with the necessity which created it. There can be by implication no mutual easement of perpetual support, applicable to future structures.

In *Sherred v. Cisco*, 4 Sandf. 480, it was held that, where a party wall was destroyed by fire, the law would imply no obligation on the adjoining owners to join in rebuilding a new wall, where there was no agreement so to do, the parties being remitted to their original unqualified title up to the division line. And DENIO, C. J., in speaking of that case, declares that he sees no solid distinction between a total destruction of the wall and buildings, and a state of things which would require the whole to be rebuilt from the foundation; that in either case there is great force in saying that the mutual easements have become inapplicable. *Partridge v. Gilbert*, 15 N. Y. 601; Kerr on Injunctions, 376.

In *Cheeseborough v. Green*, 10 Conn. 318, which was an action on the case, brought by the owner of the lower part of a store against the owner of the upper part and roof, to recover damages for suffering the roof to be out of repair, the court held that the action could not be sustained, suggesting that the plaintiff could have relief only in a court of chancery.

The civil law recognizes the existence of an easement to compel the owner of the servient tenement to repair, as distinguished from the ordinary easement of support; but the additional obligation to repair can only arise from express stipulation, or by proof of a prescriptive right to the easement of repair as well as support. Gale on Easements (4th ed.), 312.

The plaintiffs' declaration in this case does not allege as a fact, in direct terms, that they were entitled to have their part of the house supported or protected by the defendants' part, or that any easement of that description existed in their favor. But, giving it the most favorable construction, and assuming that title to such support can be inferred, as matter of law, from the allegations contained in it, yet, as we have seen, the obligation to repair cannot be so inferred, and without such obligation an action cannot be maintained for mere refusal and neglect. *Peyton v. London*, 9 B. & C. 725.
Demurrer sustained.

FEITAL V. MIDDLESEX RAILROAD COMPANY.

(100 Mass. 398.)

Lord's Day — traveling on — Spiritualist meeting — Railroad — Negligence.

Plaintiff was injured on defendants' road while returning, on Sunday, from a Spiritualist camp meeting. *Held*, that it was for the jury to say whether the meeting was of a religious character and whether the plaintiff attended it for the purpose of divine worship and religious instruction, so as to bring him within the exception of the act prohibiting traveling on Sunday.

In an action against a railroad company to recover for injuries occasioned through its alleged negligence, *held*, (1) that the fact that the defendant had leased that part of the road where the accident happened, without authority of law, was no defense, and, (2) that although the burden was on the plaintiff to prove the defendants' negligence, yet proof that the injury was caused by the cars running off the track was evidence of negligence sufficient to charge defendant in the absence of explanation.

ACTION of tort, by Albert Feital and wife, against a street railroad company, for injuries alleged to have been caused to the wife by an accident while she was traveling on defendant's car.

The evidence tended to show that the accident occurred on a Sunday while the female plaintiff was returning from a Spiritualist camp meeting which had been held at Malden; that she believed in Spiritualism as a religion and attended the meeting for devotional exercise, her own meeting, which she regularly attended in Charlestown, being omitted that afternoon. The evidence further showed that the exercises at the meeting on the afternoon in question consisted of public speaking, singing and praying; that during the exercises it was announced from the "grand stand" that Miss Laura Ellis would give "spiritual manifestations" in a tent near by, for admission to which twenty-five cents would be charged; that the plaintiff did not attend such manifestations; that they were "a part of the spiritualistic form of religion and a part of their religious services; that they consisted of Miss Ellis's being put into a cabinet with her hands tied; that music was heard coming from the cabinet, and that, when it was opened, Miss Ellis was found with her hands untied and a ring that had been on her finger was then on the end of her nose;" that some of the speakers claimed to represent the spirits of persons dead; and that some of

Feital v. Middlesex Railroad Company.

the speakers said they would throw away the Bible in their search after truth.

The accident happened through the car running from the track on a part of the road which defendant had leased from the Malden & Melrose Railroad Company.

At the close of their evidence, the defendants requested the judge to instruct the jury as follows:

"1. The plaintiffs were traveling on board the defendant's car to a spiritualist camp-meeting from Malden to Charlestown. I instruct you that the plaintiff had no right to hire a passage on board of this car for such a purpose. It was not traveling for necessity or charity, and therefore the plaintiff cannot recover.

"2. That plaintiff received her accident on Sunday. She went from Boston to Malden to a spiritualist camp-meeting, and returned and received her injury, as she claims, on board of the defendant's car. The evidence seems to show that she was traveling on a car which had no legal contract to carry any one on that day. This she is taken to know, and I therefore instruct you that under this state of facts she cannot recover.

"3. The plaintiff received her accident from the fact of the car's running off the track while traveling at a moderate rate. There is no evidence that the car was out of order. It is not claimed that the driver did any thing wrong, or that the rails were before or then or afterward out of order. It is only evident that the car ran off the rails, one wheel inside and one wheel outside, and all that had to be done was to lift the fore part of the car and replace the wheels upon the track. Under these circumstances, the plaintiff cannot recover.

"4. The defendants leased the road on which this happened, contrary to the statutes, and hence had no authority to run their cars over this track, could make no contract to carry passengers, and, being a corporation, cannot be liable.

"5. That there was no evidence of any negligence on the part of the defendants.

"6. That the burden of proof is upon the plaintiffs to show how the accident happened and what was the particular negligence that caused the same, and that, unless the plaintiffs had done so, they could not recover."

The jury found for the plaintiffs, with damages in the sum of \$5,000, and the defendants alleged exceptions. The bill of excep-

Feital v. Middlesex Railroad Company.

tions, after stating the six instructions specially requested by the defendants, continued thus: "To which rulings and refusals to rule the defendants, being aggrieved, except;" and did not state with what instructions the case was submitted to the jury.

T. H. Sweeter and *L. M. Child*, for defendants. 1. The plaintiffs cannot recover, unless Mrs. Feital was traveling from necessity or charity. Gen. Stats., chap. 84, § 2. *Stanton v. Metropolitan Railroad Co.*, 14 Allen, 485. Under the statute, no one has a right to travel on the Lord's day to attend even religious services away from his home and accustomed place of worship. But the meeting which the plaintiffs attended was held for idolatry and jugglery. It avowed its hostility to Christianity, by throwing away the bible, and its substance was a juggler's show, with some free performances outside, to attract the crowd to the main exhibition, to which an admittance was charged. Mrs. Feital may have a right to be an idolator and to attend shows, but not in violation of the statute, which was intended to protect the conscience of the majority of the people from being offended by the public practice on the Lord's day not only of idolatry, but even of "all acts of a secular nature, belonging to or connected with ordinary business or common worldly affairs." BIGELOW, C. J., in *Bennett v. Brooks*, 9 Allen, 118, 119. Her attendance at that meeting was an act "not morally fit and proper to be done on the Sabbath." See *Commonwealth v. Sampson*, 97 Mass. 407. The test is not her conscience, but the true intent of the statute. The assemblage was precisely one adapted "to the disturbance of serious people, either at public worship or in their own houses." *Commonwealth v. Knox*, 6 Mass. 76, 78; see also *Pearce v. Atwood*, 13 id. 324; *Flagg v. Millbury*, 4 Cush. 243.

2. The defendants' lease of the Malden and Melrose Railroad was without legislative sanction, and void. They therefore had no valid contract of transportation with Mrs. Feital; and as the relation of passenger and carrier did not exist, she cannot maintain an action for a breach of its duties. *Hood v. New York & New Haven Railroad Co.*, 22 Conn. 502; *Naugatuck Railroad Co. v. Waterbury Button Co.*, 24 id. 468; *Pearce v. Madison & Indianapolis Railroad Co.*, 21 How. 441; *East Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C. B. 775; *McGregor v. Dover & Deal Railway Co.*, 18 Q. B. 618; *Great Northern Railway Co. v. Eastern Counties Railway*

Felton v. Middlesex Railroad Company.

Co., 9 Hare, 306; *Safford v. Wyckoff*, 1 Hill, 11; *Leavitt v. Palmer*, 3 Comst. 19; *Tulmage v. Pell*, 3 Seld. 328.

3. The plaintiff did not sustain the burden of showing how the accident happened, and that it happened by some fault of the defendants. The defendants were bound to exercise a high degree of care to provide suitable tracks and cars and horses, and then to exercise a like care in driving the cars; but the evidence shows no negligence in any of these respects. *Pemberton Co. v. New York Central Railroad Co.*, 104 Mass. 144. The fact of an accident does not raise a presumption of negligence in a carrier, unless it appears from the nature of the accident that it was due to some want of care on his part. *Curtis v. Rochester & Syracuse Railroad Co.*, 18 N. Y. 534; *Bowen v. New York Central Railroad Co.*, id. 408; *Hammack v. White*, 11 C. B. (N. S.) 587, 594. Passengers are not entitled to every precaution to insure their safety, which may be suggested in the light of an accident. *Crafter v. Metropolitan Railway Co.*, Law Rep., 1 C. P. 300. But in this case the plaintiffs fail to suggest any possible additional precaution. The cause of this accident was not only undiscoverable beforehand, but has always remained so. *Ingalls v. Bills*, 9 Metc. 1. The only attempt of the plaintiffs to explain it consists in evidence of the opinion of the driver of the car, which affords no foundation for a verdict, and which the facts contradict. See also *Christie v. Griggs*, 2 Camp. 79; *Crofts v. Waterhouse*, 3 Bing. 319, and 11 Moore, 133; *Toomey v. London, Brighton & South Coast Railway Co.*, 3 C. B. (N. S.) 146; *Cotton v. Wood*, 8 id. 568; *Cornman v. Eastern Counties Railway Co.*, 4 H. & N. 781.

G. A. Somerby, for plaintiffs.

COLT, J. The points made by the defendants upon these exceptions are all embraced in the requisite for specific instructions. The instructions which were given in place of those requested are not stated, and must be taken to have been full and correct in other respects.

1. There was evidence tending to prove that the meeting which the plaintiff attended, and from which she was returning when injured, on the Lord's day, was a religious meeting of those who held a religious belief in common with her; and that she attended it in good faith, for devotional exercise, as matter of conscience,

Feital v. Middlesex Railroad Company.

and because the meeting which she regularly attended in Charles town, where she lived, was temporarily suspended. The jury must have so found. The necessity of traveling, within the exception in the Lord's day act, is to a great extent determined by its moral fitness and propriety; and it would have been erroneous to have ruled, as matter of law, that traveling for such a purpose was not within the exception. *Bennett v. Brooks*, 9 Allen, 118; *Commonwealth v. Sampson*, 97 Mass. 407; *Hamilton v. Boston*, 14 Allen, 475. It was for the jury to say, upon all the evidence, whether the meeting was of the character claimed by the plaintiff, and whether she attended it for the honest purpose of divine worship and religious instruction.

2. The defendants insist that, as they leased that portion of their line, where this accident happened, of the Malden and Melrose Railroad Company, without legislative sanction, the contract of transportation made with the plaintiff as to that part was in excess of their chartered powers and void, and therefore no action for a breach of the duties of passenger carrier at that point can be maintained. But the legality of their contract with the plaintiff does not depend upon the validity of this lease. There is no doubt, under our decisions, of the legal capacity of a railroad corporation to resume responsibilities, as incident to their business, for the safe transportation of passengers and their baggage beyond the limits of their own line or of roads under their immediate control; at least, to the extent here indicated. *Najac v. Boston & Lowell Railroad Co.*, 7 Allen, 329. The defendants were in actual possession and use of the track, without objection from the owners or the commonwealth; they assumed this responsibility to the plaintiff for a valuable consideration; and it is wholly immaterial, so far as this action is concerned, that the lease was not legally made. In *McCluer v. Manchester & Lawrence Railroad Co.*, 13 Gray, 124, it was held that the company cannot avoid their liability for goods injured on a connecting road leased to them, on the ground that the lease is void. See, also, *Burroughs v. Norwich & Worcester Railroad Co.*, 100 Mass., 26; *Hill Manufacturing Co. v. Boston & Lowell Railroad Co.*, 104 id. 122.

It is unnecessary to consider what relation may have existed between other passengers and the defendants. If the plaintiff was lawfully traveling, then the defendants had a right to carry her, and it is enough that between them alone the relation of carrier and passenger existed.

Emery v. Huntington.

3. Upon the question of the defendants' negligence, the instructions were all properly refused. It is true that a carrier of passengers does not warrant the absolute safety of his passengers. His undertaking goes no further than this, that he will use reasonable care according to the nature of his contract; and as that involves the safety of the lives and limbs of passengers, the law requires the highest degree of care which is consistent with the nature of the undertaking. If an accident then happens, the carrier is not responsible. *Warren v. Fitchburg Railroad Co.*, 8 Allen, 227, 233; *Crofts v. Waterhouse*, 3 Bing. 319, 321.

The burden is on the plaintiff to prove the defendants' negligence. But there are cases where proof of the occurrence of the accident, and of the exercise of due care on the part of the plaintiff, is *prima facie* proof of the defendants' negligence. A railroad and its cars are constructed and adjusted to each other with the purpose that, when there is no defect in either, the cars shall remain on the track. The fact that a car runs off is evidence of defect or negligence somewhere; and where the track and the cars are under the exclusive control of the defendants, it has been held evidence of negligence sufficient to charge them, in the absence of any explanation showing that the accident happened without fault on their part. *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; *Carpus v. London & Brighton Railway Co.*, 5 Q. B. 747. It is not incumbent on the plaintiff, after proving an accident which implies negligence, to go further and show what the particular negligence was, when, from the circumstances, it is not in his power to do so.

Exceptions overruled.

EMERY V. HUNTINGTON.

(109 Mass. 431.)

General average. Contribution.

A bark being in inevitable danger, without her fault, of collision with a steamer, changed her course so as to strike the steamer stem on, thereby probably saving herself from being sunk with her cargo. In consequence of the collision she was obliged to go for repairs into a port of a country where the duty of a steamer to keep out of the way of a sailing vessel was not recognized, and where she was compelled, at the suit of the owner of the

Emery v. Huntington.

steamer, by a decree of court, to bear half the damage to both vessels and therefore to pay a certain sum to the steamer. In a suit in equity by the owner of the bark against the owners of her cargo for contribution, *held* that neither the expenses of the repairs rendered necessary by the collision, nor the sum paid to the steamer, nor the costs of defending the suit, was a subject for general average.

BILL IN EQUITY filed by John S. Emery and others, owners of the bark "Megunticook" against Edward B. Huntington and others consignees of the cargo of said bark for contribution. The bill alleged that in August, 1870, while the said bark was on a voyage from Stockholm to Boston with a cargo of iron, consigned to the defendants, she came into collision with the English steamer "Hugh Taylor," about six miles from the coast of Denmark; that when the vessels came in sight of each other, the bark kept on her way as the laws of the United States and of England required her to do, but that the steamer, instead of keeping out of her way as she might have done and was by law required to do, suddenly ported her helm, when near the bark, and kept across the bark's bow, thereby rendering a collision inevitable; that the bark did every thing possible to avoid the collision; that the collision was wholly caused by the negligent and illegal conduct of the persons in charge of the steamer; "that when it became apparent to the master and others in charge of the bark that a collision was inevitable, and that, as the bark was then heading, there was imminent danger that it would cause the sinking of the bark and the total loss of her cargo and freight, and of the lives of all on board, the master, to diminish the effect of the impending blow, and enable the bark to strike the steamer stem on, ordered her helm put hard to starboard, and thereby succeeded in changing her course so far to port that she struck the steamer's broadside stem on; that by striking the steamer in this manner the bark was greatly damaged, her jib-boom, cutwater and bobstays were carried away and her stem was crushed from the top downward, several feet below her water line when light, and two of her breast-hooks broken; that the bark, her freight and cargo were in imminent danger, and would in all probability have been totally lost, if the bark had not been voluntarily run upon and against the steamer in the manner aforesaid, and the damage above described voluntarily incurred; that the bark was so run upon and against the steamer, and the damage voluntarily incurred, for the safety and preservation of the bark, her

Emery v. Huntington.

cargo and freight and the lives of the persons on board, and by means thereof the same were saved; and that after the collision and damage had taken place, in the condition the bark then was, it was impossible for her to proceed on her voyage, and she was in fact in imminent danger of being lost, so that it became absolutely necessary for the safety and benefit of vessel, cargo and freight, to go into the harbor of Copenhagen to repair the bark, and she went there accordingly."

The bill then alleged "that while at Copenhagen proceedings were commenced by the owner of the steamer, in the maritime and commercial court of Copenhagen, for the recovery of damages done to the steamer by the collision, she having also put into Copenhagen for necessary repairs; that thereupon the bark was seized for security for such damages as should be recovered in such proceedings; that after a hearing the court decreed that the damages to both vessels should be aggregated and equally divided between the parties, and, in applying this rule of damages, and the damages suffered by the bark being first deducted, that there remained to be paid to the owner of the steamer on behalf of the bark the sum of 5,472 rix dollars, with interest, and that the seizure of the bark should remain in force for that amount; that in order to get possession of the bark to be used for the prosecution of the voyage, or for any purpose, it was necessary to pay said sum, and it was accordingly paid on behalf of the owners of the bark, with interest; that in rendering said decree the court proceeded under a Danish law, in substance as follows: 'Where two vessels sailing meet and are unable to avoid each other, but both sustain damage, then both masters with their crews shall make oath that it happened unintentionally and not with design, and then both masters shall bear the damage, each of them for one-half-share, whether it occurs by day or by night;' that there is no law in Denmark requiring steamers to keep out of the way of sailing vessels; that the court did not find the bark in fault for the collision, but held that it was a common accident, under the rule of law above set forth, and that the damages must be borne as in said rule provided; that when, to avoid being sunk by the impending collision, the bark changed her course, so as to strike the steamer's broadside stem on, she by that movement inflicted a severe blow upon the steamer, and so caused the damage to the steamer for which by the decree of the court payment was ordered and made; that the damages so inflicted

voluntarily upon the steamer and the payment for the same are to be regarded as a voluntary sacrifice made by the master of the bark for the safety and benefit of the bark, her cargo and freight; that in consequence of entering the port of Copenhagen, the bark and her pending freight became subject to the Danish law and to the jurisdiction of the Danish court, became liable to be and was seized by the order of the court, and was forced to submit to its jurisdiction, abide its decree, and pay the sum of money decreed by it as aforesaid, and also to incur heavy expenses in making defense against said claim and in other proceedings for the promotion of the defense; and that, inasmuch as entering said port voluntarily for the purposes above set forth was for the benefit of the bark, her freight and cargo, the sum paid in pursuance of the decree of the court and for defense as aforesaid, is to be regarded as a voluntary sacrifice for the common relief and benefit of the bark, cargo and freight, and all interested therein."

The bill further alleged that the cargo was saved, and was carried to its destination and delivered to the defendants; that the plaintiffs were entitled to contribution from the defendants for expenses in repairing the damages done to the bark by the collision, for the sums paid for the damages done to the steamer, and for the expenses incurred in the defense of the proceedings in the court at Copenhagen; and that a general average adjustment was properly prepared. The prayer was, that the defendants might pay the sums due from them according to this adjustment.

The defendants demurred to the bill for want of equity, and the case was reserved by COLT, J., on the bill and demurrer, for the determination of the full court.

H. C. Hutchins and A. S. Wheeler, for defendants.

J. C. Dodge, for plaintiffs.

GRAY, J. In order to support a claim for contribution in general average, there must be an extraordinary and voluntary sacrifice of part of the interests at risk for the benefit of all, by which part is rescued from the imminent peril impending over the whole. The danger encountered by the election of the master may be either of a different kind from the danger avoided, or of the same kind; but it must not be the very same danger, merely modified by acts

Emery v. Huntington.

done by the master, in the performance of his ordinary duty in the navigation or management of the vessel, so to meet the impending peril as to diminish its effects as far as possible. *Nickerson v. Tyson*, 8 Mass. 467; *Scudder v. Bradford*, 14 Pick. 13. BIGELOW, C. J., in *Merithew v. Sampson*, 4 Allen, 192, 195; *Slater v. Hayward Rubber Co.*, 26 Conn. 128; Phil. Ins. (3d ed.), §§ 1297, 1313.

The case of a ship in immediate danger of capture affords a good illustration of the true distinction. If the master runs her ashore and thereby saves part of the cargo, or throws overboard part of the cargo and so enables the ship to escape, it is a case of general average. *Cass v. Reilly*, 3 Wash. C. C. 298; *Barnard v. Adams*, 10 How. 270, 304. So if the master of a ship, after being chased by an enemy who is rapidly gaining on him, at nightfall launches and sets adrift his long boat, fitted with a mast and sail and a lantern at the mast head, and thereby misleads the enemy and escapes. *Emerigon des Assurances*, chap. 12, § 41, § 5; 3 Kent's Com. (6th ed.) 238, note; 2 Arnould on Ins. (3d ed.) 775. But, in the absence of any statute or ordinance on the subject, damages incurred, or ammunition expended by a private armed vessel, in fighting off an enemy, are not subjects of general average. *Emerigon*, chap. 12, § 41, § 8; *Taylor v. Curtis*, Holt's N. P. 192; 4 Camp. 337; 6 Taunt. 608; 2 Marsh. 309.

In all the decisions cited by the learned counsel for the plaintiffs, the peril elected by the master, and by which the injury was done for which contribution was sought, was a different peril from that which threatened the loss of ship and cargo. Most of them were cases of a vessel in imminent danger of foundering, or of being driven on shoals or rocks and thereby going to pieces before reaching the shore, and whose master, having no other means of saving vessel or cargo, ran her, beside or over the shoals or rocks, upon the beach. *Sims v. Gurney*, 4 Binn. 124; *Columbian Insurance Co. v. Ashby*, 13 Pet. 331; *Barnard v. Adams*, 10 How. 270; *Sturges v. Cary*, 2 Curt. C. C. 59; *Rea v. Cutler*, 1 Sprague, 135; *Merithew v. Sampson*, 4 Allen, 192. In another case, the dangers avoided were those of fire on board and of being driven on a rocky and precipitous shore, the risk voluntarily undertaken by the master was that of running into an unknown bay without a pilot, knowing that stranding was one of the chief risks thereby assumed, and the injury actually suffered was by grounding on an unseen reef at the entrance of the bay. *The Star of Hope*, 9 Wall. 203.

In the remaining case, the ship and cargo, being in danger of sinking in deep water, were run upon the flats and so stranded in shoal water, thereby increasing the peril to the ship, and diminishing the danger to the cargo and the expenses of saving both. *Rathbone v. Fowler*, 6 Blatch. C. C. 294, and 12 Wall. 102.

But it has never, so far as we are informed, been held or suggested, by any court or commentator, and could not be maintained, consistently with sound principles, that where a vessel is in inevitable danger of being thrown upon a particular rock or reef or shoal, and the master, in the exercise of his duty of so managing the vessel as to make the consequent damage to ship and cargo as little as possible, runs the ship upon the same shoal or rock or reef, in such manner as to bring a different part of the vessel in contact with it from that which the mere force of the winds and waves would, he makes a voluntary sacrifice which will found a claim for contribution in general average. If it were so, there could hardly be a case of a shipwreck, in which the master did his duty, and which did not result in a total loss of ship and cargo, which would not require a general average contribution.

In the present case, taking the allegations in the bill to be true, as we must upon the demurrer, they show that the impending peril was a collision between the plaintiff's bark and the steamer; that such collision was inevitable; that the act voluntarily done by the master of the bark was merely to starboard her helm, an ordinary maneuver of seamanship; that its purpose was to diminish the effect of the impending blow; that by that act the collision was not avoided, but was met as well as might be, and only the position and manner in which the two vessels struck together modified; and that the damage to the bark, though less than it would have been if her course had not been changed, was all caused by the original peril of collision between the two vessels, and not by any new or different one. The plaintiffs cannot therefore claim a general average of the expenses of repairing the damages thus occasioned to their vessel.

It is no less clear that the sums paid by the plaintiffs under the decree of the Danish court (after putting into Copenhagen for repairs) for a portion of the damage done to the steamer, and the expenses incurred in defending against such proceedings, are not subjects of general average contribution. The Danish court had jurisdiction of the cause and possession of the bark; the proceed-

Jordan v. Osgood.

ings therein were against the bark alone, and not against her cargo; and neither the incurring of the expenses of the proceedings, nor the payment of money under the final decree, can be considered as consequences of taking the bark within its jurisdiction, or as resulting from a voluntary sacrifice. The real and legal cause of the liability to pay such damages and expenses was the meeting of the two vessels in collision. *Peters v. Warren Insurance Co.*, 3 Sumn. 389, 14 Pet. 99, and 1 Story, 463; *Nelson v. Suffolk Insurance Co.*, 8 Cush. 477; *General Insurance Co. v. Sherwood*, 14 How. 351. The collision not having been a peril voluntarily incurred, the damages and expenses resulting therefrom were not matters of general average. STORY, J., in 3 Sumn. 393, and 1 Story, 468; Phil. Ins., § 1272.

Demurrer sustained, and bill dismissed.

JORDAN V. OSGOOD.

(100 Mass. 457.)

Evidence of contemporaneous frauds to prove fraud charged — evidence of bank account.

In replevin of goods alleged to have been procured by the defendant of the plaintiff, on credit, by means of false and fraudulent representations as to his pecuniary condition, and also with intent not to pay for them. *Held*, that evidence of another act of fraud committed, about the same time, by the defendant was not admissible to prove the fraud charged, unless there was evidence that the two were parts of one scheme of fraud committed in pursuance of a common purpose.

Held, also, that the books of the bank where the defendant kept his deposit, supported by the oath of the book-keeper, were admissible to show what money he had in the bank at the time.

REPLEVIN of goods alleged to have been obtained of plaintiff by defendant, on credit, by means of false and fraudulent representations as to his pecuniary condition, and with intent not to pay them.

The evidence tended to show that the defendant, a retail trader, in order to procure goods of plaintiff on credit, told plaintiff that

he had a capital of \$6,000 above liabilities ; had no accounts overdue and unpaid, and owed little borrowed money ; that, relying on these representations, plaintiff sold him the goods on credit ; that defendant did not have at the time a capital of \$6,000 ; that he owed accounts overdue and also considerable borrowed money, and was insolvent, to his own knowledge ; that, shortly after the said transaction, he failed and was adjudged a bankrupt on his own petition. Evidence was offered by plaintiff and received, against defendant's objection, tending to show that defendant obtained goods of other persons about the same time by like fraudulent representations.

Testimony of the book-keeper of the bank where defendant kept his deposit was received to show that, at the time of the transaction, defendant had but a small balance in the bank, and the book-keeper was allowed to use a transcript of the books of the bank to refresh his memory — the defendant having agreed that the transcript might be used the same as the books might have been. The other facts are not material.

The jury returned a verdict for the plaintiffs "because of false representations," and the defendant alleged exceptions.

A. A. Ranney and D. F. Crane, for defendant.

J. D. Ball, for plaintiffs, to the point that evidence of other fraudulent representations was admissible, cited *Rowley v. Bigelow*, 12 Pick. 307 ; *Wiggin v. Day*, 9 Gray, 97 ; *Stebbins v. Miller*, 12 Allen, 591, 598 ; *Winchester v. Charter*, 97 Mass. 140 ; *Lynde v. McGregor*, 13 Allen, 172 ; *Allison v. Matthieu*, 3 Johns. 235 ; *Hawes v. Dingley*, 17 Me. 341 ; *Lincoln v. Clafin*, 7 Wall. 132 ; *Cary v. Hotailing*, 1 Hill (N. Y.), 311 ; *Castle v. Bullard*, 23 How. 172 ; *Hathorne v. Hodges*, 28 N. Y. 486.

MORTON, J. In this action the plaintiffs, having sold and delivered certain goods to the defendant, seek to rescind the sale upon the ground of fraud. They rely upon two grounds : First, that the defendant obtained the goods by false and fraudulent representations as to his pecuniary condition ; and second, that he obtained them intending at the time not to pay for them. The representations alleged to have been made by the defendant were, that he had a capital of \$6,000 over and above his liabilities ; that he had no

Jordan v. Osgood.

overdue accounts unpaid, and was owing little borrowed money. At the trial, the presiding judge admitted testimony that, at or about the time of the purchases of the plaintiffs, the defendant made the same and also other representations, to other persons, which were false and fraudulent. The principal question upon this bill of exceptions is as to the competency of this testimony. As we have seen, there were two issues before the jury; although they decided the case upon the issue of false representations, yet at the time of the ruling both issues were pending, and if the testimony was competent upon either, it was rightly admitted.

We think it is clear that, upon the issue whether the defendant made the alleged representations to the plaintiffs, the evidence admitted was incompetent. The fact that a defendant has committed a similar but distinct crime or fraud is not competent to prove that he committed the particular crime or fraud with which he is charged. It has no tendency to prove the proposition to be established by the plaintiffs, but is equally consistent with an affirmative or negative decision of that proposition. The effect of such proof may be to produce such a state of mind in the jury to whom it is addressed, that a less weight of testimony satisfies them than would otherwise be necessary to produce conviction, but it does not directly tend to prove or disprove the matter in dispute. The admission of such evidence would introduce a multiplicity of collateral issues, calculated to withdraw the attention of the jury from the real issue in the case; and it would operate unjustly to the defendant, as it requires him to explain his transactions with others, without any notice or opportunity for preparation.

The question whether the evidence objected to was admissible under the second issue appears from some of the authorities to be one of more difficulty. The plaintiffs' position is that the defendant obtained the goods with the intention not to pay for them. This, if proved, would authorize them to repudiate the sale. *Dow v. Sanborn*, 3 Allen, 181. It is obvious that the principal element involved in this issue is the intention of the defendant at the time of the transactions, and any evidence which directly tends to show such intention is competent. Therefore contemporaneous frauds committed by the defendant are admissible if they tend to prove the motive or intention which actuated the defendant in the transaction under investigation.

The cases are numerous in which this subject has been discussed.

We think the true rule to be deduced from them is, that another act of fraud is admissible to prove the fraud charged only where there is evidence that the two are parts of one scheme or plan of fraud, committed in pursuance of a common purpose.

In *Lynde v. McGregor*, 13 Allen, 172, subsequent fraudulent conveyances were admitted to show that a prior conveyance between the same parties was fraudulent; but the court put it upon the ground that, upon the whole evidence, they appeared to be parts of one transaction, executed with a common fraudulent intent. In *Taylor v. Robinson*, 2 Allen, 562, the question was whether a deed to the defendant was fraudulent as to the grantor's creditors, and evidence was admitted that the grantor on the same day conveyed all her real and personal estate to her relatives, as tending to show a common fraudulent intent in all the conveyance.

In *Williams v. Robbins*, 15 Gray, 590, the plaintiff sought to impeach a deed to defendants as being fraudulent as against the grantor's creditors. Evidence of a transfer of the personal property of the grantor to the defendants with intent to defraud his creditors, made three months after the deed, was excluded, on the ground that no connection between the two transactions was shown. MERICK, J., says: "The authorities referred to by the counsel for the defendants fully sustain the proposition that a transaction proposed to be proved for the purpose of invalidating a conveyance, which is the subject of controversy, on the ground of fraud, must be shown to be so connected with it as to make it apparent that the parties had a common purpose in both, or it will not be admissible as evidence."

The case of *Wiggin v. Day*, 9 Gray, 97, more nearly resembles the case at bar. The action was replevin for two wagons attached by the defendant, a deputy sheriff, as the property of one Brastow. The plaintiff, as evidence that Brastow bought the wagons with the intent not to pay for them, was permitted to show that about the time of this sale Brastow was insolvent, and purchased large amounts of personal property of third persons and got them into his hands by fraud, and then secreted them in various places. This evidence was admissible under the rule stated in the cases above cited. The secreting the goods was a very significant fact, and, in connection with the other evidence, tended strongly to prove a general scheme of fraud, of which the purchase of the wagons was a part.

Jordan v. Osgood.

In *Rowley v. Bigelow*, 12 Pick. 307, the plaintiffs alleged that one Martin, an insolvent person, had fraudulently obtained possession of the goods in controversy by pretending to purchase them for cash. Evidence was admitted "that Martin had made similar purchases" of others "about the same time, and under circumstances tending to show that he was insolvent and that he knew it, and had no reasonable expectation of paying for the merchandise according to his contract." What those circumstances were does not appear in the report of the case. The court held the evidence competent upon the ground that it had a direct tendency to show that Martin was insolvent, knew he was insolvent, and did not expect or intend to pay for the goods purchased, and thus had a direct bearing upon the issues involved in the case. It cannot be regarded as an authority for the proposition that it is competent in proof of an alleged fraud to give evidence of a distinct act of fraud, not part of one scheme, and not connected in design.

We think the result of the authorities is, as stated in substance in *Williams v. Robbins*, *ubi supra*, that the transaction proposed to be proved for the purpose of showing the fraud which is the subject of controversy, must be shown by some evidence, direct or circumstantial, to be so connected with it as to make it apparent that the defendant had a common purpose in both; but if the transaction is distinct and with no connection of design, it is not admissible. Testing the case at bar by this rule, we are of opinion that the evidence of other false representations made by the defendant about the time when he purchased the goods of the plaintiffs was inadmissible. There is no evidence showing any connection between the alleged fraud practiced on the plaintiffs and the other transactions. These transactions appear to have been purchases in the usual course of the defendant's business.

The mere fact that an insolvent trader makes misstatements as to his pecuniary condition does not justify the inference that he has formed a general scheme to cheat, and there was no evidence of any suspicious disposition of his property, by concealment or preferring favored creditors, or otherwise, which tended to show such scheme.

There was nothing in the nature of the acts nor in independent testimony showing a connection between the transactions. The evidence of these distinct transactions, therefore, was not competent.

We cannot agree with the argument of the plaintiffs that this

Worthington v. Scribner.

exception becomes immaterial because the jury found for the plaintiffs upon the issue of false representations. The evidence was calculated to prejudice the jury against the defendant upon this issue, and its admission affords a sufficient reason for a new trial.

The other exceptions may be briefly considered. One of the issues involved was the insolvency of the defendant before and at the time of his purchases. It was competent to show what money he had in the bank at those times. For this purpose the books of the bank, supported by the oath of the book-keeper, were admissible. *Briggs v. Rafferty*, 14 Gray, 525; *Adams v. Coulliard*, 102 Mass. 167. The defendant agreed that the transcript from the books might be used in the same manner as the books themselves could be. The jury were rightly allowed to read it.

We express no opinion upon the question whether the record of the district court was admissible under the circumstances of the case, as the circumstances may be different upon another trial.

We are of opinion that the defendant has no ground of exception to the admission of the testimony of the expert who had examined his books and schedules. The witness was not allowed to state deductions and inferences of his own judgment, but merely results of computations, and his testimony was admissible in the discretion of the presiding judge. *Boston & Worcester Railroad Co. v. Dana*, 1 Gray, 83.

Exceptions sustained.

WORTHINGTON V. SCRIBNER.

(100 Mass. 497.)

Privileged communications — information to a government officer.

In an action for falsely and maliciously representing to the treasury department of the United States that the plaintiff was intending to defraud the revenue, the plaintiff filed interrogatories requiring the defendant to answer whether he did not inform the department that he knew or believed that plaintiff was intending to commit a fraud upon the revenue. *Held*, that any communications of the kind to the department were privileged in the sense that their disclosure will not be compelled or permitted without the assent of the government, and that defendant would not be compelled to answer the interrogatories.

Worthington v. Scribner.

TORT against Charles Scribner and others. The declaration alleged that the plaintiff was engaged in importing books into the United States; that the defendants without probable cause and maliciously and falsely represented to the treasury department of the United States that the plaintiff was intending to bring books into the United States in fraud of the revenue laws; that the department thereupon and induced thereby caused plaintiff's books to be seized and libeled when entered for import; and that the proceedings were afterward dismissed and the books released.

The defendants' answer denied all the plaintiff's allegations, and further alleged "that if any communication was made by any person to said solicitor or other officer of the United States, as alleged, or relative to any anticipated attempts to introduce goods into the United States without payment of the proper duties thereon, and not in conformity with the laws of the United States, the same would be a privileged communication, and would not be ground or cause for this action."

The plaintiff filed interrogatories, to be answered by the defendants severally, one of which was as follows: "Did you not, in the summer or fall of 1869, and if so, when, inform the United States treasury department, the secretary, the solicitor of the treasury, or some officer or employee in said department, and if yea, when, that you knew, or believed, or thought that the plaintiff was buying large quantities of books in England, with the intention of bringing them into the United States in violation of law, or any thing to that effect? If yea, state fully all that you did in the matter, including copies of all written communications, and substance of all oral statements." There were several similar interrogatories.

The defendants refusing to answer these interrogatories, the plaintiff moved that they be ordered to do so, and the question whether the motion should be granted was reserved for the determination of the full court.

R. M. Morse, Jr., and R. Stone, Jr., for plaintiff.

G. S. Hale, for defendants.

GRAY, J. It is the duty of every citizen to communicate to his government any information which he has of the commission of an offense against its laws. To encourage him in performing

this duty without fear of consequences, the law holds such information to be among the secrets of State, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications.

The earliest case upon the subject is *Rex v. Akers*, 6 Esp. 125, note, in which, on an indictment for obstructing a custom-house officer in the execution of his duty, Lord KENYON said: "The defendant's counsel have no right, nor shall they be permitted, to inquire the name of the person who gave the information of the smuggled goods." All the English authorities agree that the rule has ever since been held in revenue cases to prevent a witness from answering questions that would disclose the informer, if a third person; and in *Attorney-General v. Briant*, 15 M. & W. 169, it was held that a witness could not be asked on cross-examination whether he was himself the informer. The rule has been nearly as long established in prosecutions for high treason. *Rex v. Hardy*, 24 Howell's State Trials, 199, 753, 816-820, 823; *Rex v. Watson*, 32 id. 1, 102-105; S. C., 2 Stark. 116, 136. And it has been often applied in civil actions.

In *Robinson v. May*, 2 Smith, 3, which was an action for a libel in a letter by the defendant to the lords of the admiralty, charging the plaintiff with unlawfully pretending to be a magistrate and granting protections to vessels to the prejudice of the royal service, the lords of the admiralty had given up the letter and directed the action to be brought, so that no question whether it could otherwise have been put in evidence arose; the only question argued was whether the letter could be held to be a libel; and Lord ELLENBOROUGH, in delivering judgment against the defendant on that question, expressed a significant doubt "whether the board of admiralty did right in suffering the paper to go out of their hands, since it might tend to discourage the giving of information con-

Worthington v. Scribner.

cerning abuses" — thus distinctly implying that, but for the course taken by the board of admiralty, the plaintiff could not have proved his case.

In *Home v. Bentinck*, 2 Brod. & Bing. 130, it was held by Chief Justice ABBOTT, and affirmed in the exchequer chamber, in an action for libel by an officer of the army against the president of a military court of inquiry, that neither their report to the commander in chief, nor an office copy of it, should be admitted in evidence. In the very recent case of *Dawkins v. Rokeby*, L. R., 8 Q. B. 255, the same court held the statements, oral or written, of an officer, examined before such a military tribunal, to come within the same principle. And in *Beatson v. Skene*, 5 H. & N. 838, an action of slander against one military officer for speaking defamatory words of the military conduct of another, it was held that the secretary for war, who objected to produce in evidence the minutes of a court of inquiry, and letters written to the war department by the plaintiff himself, on the ground that their production would be prejudicial to the public service, was not bound to produce either.

In *Earl v. Vass*, 1 Shaw. 229, which was an action for a libel alleged to be contained in a letter to the board of customs before which the nomination of the plaintiff as a custom-house officer was pending, the house of lords, upon the opinion of Lord ELDON, after conference with Chief Justice ABBOTT, held that the board could not be compelled to produce the letter, "because it is against public policy that you should be compelled to produce instruments and papers which, if persons are compelled to produce, it must shut out the possibility of the public receiving any information as to a person's fitness to be appointed to an office;" and "it would be a very dangerous thing indeed, if this were permitted."

In *Marbury v. Madison*, 1 Cranch, 137, 144, the supreme court of the United States compelled the acting secretary of state to testify whether certain commissions from the executive had ever been in his office, only because "that could not be a confidential fact;" and declared, that if there was any thing confidential, or the secretary thought any thing was communicated to him in confidence, he was not obliged to disclose it.

The ruling of Chief Justice MARSHALL upon the trial of Aaron Burr, cited for the plaintiff, was merely that a *subpoena duces tecum* might be issued to the president of the United States for a letter addressed to him by a military officer who was to be a

witness against the defendant; leaving the question of the production of the letter, if containing any matter which in the judgment of the president could not be disclosed without injury to the public, to be considered on the return of the subpoena. 1 Burr's Trial, 177-189. And he never had occasion to decide that question. See 2 Burr's Trial, 533-539.

In *United States v. Moses*, 4 Wash. C. C. 726, upon the trial of an indictment for counterfeiting, it was ruled that the officer who apprehended the defendant was not bound to disclose the name of the person from whom he received the information which led to the detection and arrest; Mr. Justice WASHINGTON saying that such disclosure might be highly prejudicial to the public in the administration of justice by deterring persons from making similar disclosures of crimes which they knew to have been committed.

In *State v. Soper*, 16 Me. 293, a like ruling was made upon the cross-examination of the owner of stolen goods, when called as a witness for the government upon the trial of an indictment for larceny.

In Pennsylvania, it has been determined in an action for a libel contained in a deposition made and sent to the governor by a private citizen, charging the plaintiff with misconduct in office, that it was within the discretion of the governor to produce or withhold the letter, and that parol evidence of its contents was inadmissible. *Gray v. Pentland*, 2 S. & R. 23; *Yoter v. Sanno*, 6 Watts, 164, 166.

In *White v. Nicholls*, 3 How. 266, and *Howard v. Thompson*, 21 Wend. 319, cited for the plaintiff, the original letters to the president and the secretary of the treasury, which were relied on as containing libelous matter, were produced by the plaintiff, who must have obtained them by permission of the government, so that no question of compelling a disclosure arose; and in *Howard v. Thompson* the court said that if the letters had not been surrendered by the secretary of the treasury, he could not have been compelled to produce them, and secondary evidence of their contents could not have been admitted.

The only cases which afford any color for the plaintiff's position are of rulings *at nisi prius*, of very little weight, as compared with so many well-considered judgments rendered upon full argument.

In one case before Lord KENYON and another before Baron ROLFE, a witness who appeared on his direct examination by the government to be an informer was permitted, without objection, to

Worthington v. Scribner.

testify on cross-examination that no other person gave information upon the subject; but in such a case, Baron ROLFE remarked, "The principle was rather followed than violated." *The King v. Blackman*, 1 Esp. 95; *Regina v. Candy*, cited 15 M. & W. 175.

The ruling of Chief Justice COCKBURN, upon an indictment for administering poison, in *Regina v. Richardson*, 3 F. & F. 693, compelling a policeman to answer on cross-examination from whom he had received the information in consequence of which he found the poison in a place used by the defendant, must be maintained, if at all, upon the ground that the witness had already been examined by the government as to part of the conversation between him and the informer, and might, therefore, for the protection of the defendant against any unjust inference which might be drawn from the result of such examination, be required to state the whole of that conversation.

The ruling of Lord CAMPBELL in *Dickson v. Wilton*, 1 F. & F. 419, that a communication sued on as a libel, held by the secretary for war in behalf of the crown, should be produced from his office and read in evidence, was, as observed by Chief Baron KELLY in delivering the judgment of the exchequer chamber in *Dawkins v. Rokeby*, Law Rep., 8 Q. B. 255, 273, directly at variance with the previous judgment of that court in *Home v. Bentinck*, 2 Brod. & Bing. 130, above cited.

In *Blake v. Pilford*, 1 Mood. & Rob. 198, in which Mr. Justice TAUNTON admitted in evidence, to support an action for libel, a letter to the chief secretary of the postmaster-general from a private individual, complaining of the misconduct of a guard, the objection was made by the defendant's counsel, "on the ground that it was a privileged communication made to a public officer, and that such public officer ought not to be allowed to produce it;" the post-office department had evidently suffered the letter to pass into the plaintiff's hands, for the report states that the handwriting was proved before the objection was made; and the whole attention of the judge seems to have been directed to the question whether the letter could be deemed a privileged communication upon which no action would lie. This last question was the only one touched by the other authorities cited for the plaintiff. *Fairman v. Ives*, 5 B. & Ald. 642; *Dawkins v. Paulet*, L. R., 5 Q. B. 94; *O'Donohue v. McGovern*, 23 Wend. 26; 2 Kent's Com. (6th ed.) 22.

The question now before us is not one of the law of slander or

 Bennett v. Goldthwait.

libel, but of the law of evidence; not whether the communications of the defendants to the officers of the treasury are so privileged from being considered as slanderous, as to affect the right to maintain an action against the defendants upon or by reason of them; but whether they are privileged in a different sense, so that courts of justice will not compel or permit their disclosure without the assent of the government to whose officers they were addressed. The reasons and authorities already stated conclusively show that the communications in questions are privileged in the latter sense, and cannot be disclosed without the permission of the secretary of the treasury. And it is quite clear that the discovery of documents which are protected from disclosure upon grounds of public policy cannot be compelled, either by bill in equity or by interrogatories at law. *Smith v. East India Co.*, 1 Ph. Ch. 50; *McElveney v. Connellan*, 17 Irish C. L. 55; *Wilson v. Webber*, 2 Gray, 538. The defendants therefore should

Not be ordered to answer the interrogatories.

 BENNETT V. GOLDTHWAIT.

(100 Mass. 494.)

Bankruptcy — proving debt bars action.

Proving a debt for goods sold and delivered in bankruptcy proceedings bars an action on the debt previously commenced.

CONTRACT for goods sold and delivered. The answer alleged that after the issuing of the writ, the defendant was adjudged a bankrupt on his own petition, and the plaintiffs proved the debt declared on against his estate. At the trial in the superior court, before ROCKWELL, J., the plaintiffs admitted that the facts alleged in the answer were true, whereupon the judge ruled that those facts were a defense to the action, and directed a verdict for the defendant which was returned, and the plaintiffs alleged exceptions.

I. W. Richardson for plaintiffs.

S. B. Ives, Jr., and *S. Lincoln, Jr.*, for defendant.

GRAY, J. The existing bankrupt act of the United States provides that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon shall be deemed to be discharged and surrendered thereby." U. S. Stat. of 1867, ch. 176, § 21.

This provision was not contained in the bankrupt act of 1800, nor in our own insolvent laws, and the decisions under either of those statutes have therefore no bearing upon this case.

A provision substantially similar, derived from the English bankrupt acts, was inserted in the United States bankrupt act of 1841, ch. 9, § 5; and its effect was uniformly construed to be that the proof of a debt in bankruptcy was a full and conclusive bar, at least to any action or suit already brought thereon. PRENTISS, J., in *Comstock's case*, 5 L. R. 163, 165; WARE, J., in *Everett v. Derby*, id. 225, 227; STORY, J., in *Ex parte Tebbetts*, id. 259, 265; *Haxton v. Corse*, 4 Ed. Ch. 585, and 2 Barb. Ch. 506; *Humphreys v. Swett*, 31 Me. 192; *Commercial Bank v. Buckner*, 20 How. 108.

There is nothing in the other provisions of the bankrupt act to diminish the effect of this clause, at least as to any debt which would be barred by a discharge under the act. And the next clause in this very section, which provides for the stay of actions to await the determination of the court in bankruptcy upon the question of the discharge, speaks only of a creditor "whose debt is provable," instead of saying generally "any creditor," or mentioning both proved and provable debts, as in the subsequent sections relating to provisions for opposing or annulling the discharge. §§ 31, 34. *In re Needham*, 1 Low. 309. It has indeed been held by Mr. Justice NELSON that a judgment obtained upon a debt of a class which by section 33 would not be barred by any discharge under the act (such as a debt created by fraud of the bankrupt, or in a fiduciary relation) was not surrendered by proving the debt in bankruptcy. *In re Robinson*, 6 Blatchf. C. C. 253. But that decision is opposed to the opinion of Mr. Justice STORY in *Ex parte Tebbetts*, above cited. And it is not necessary to consider which of the two should be followed, because it does not appear that the plaintiff's debt was of such a character.

The intention of congress would seem at least to have been to

hold any general creditor, who elects to take the benefit of the commission in bankruptcy, to have thereby abandoned any judicial proceeding already instituted upon the same debt, which might give him a priority or advantage over other creditors as against the bankrupt or his property. Whether a creditor, after proving his claim, and before the question of the bankrupt's discharge has been passed upon by the court in bankruptcy, can bring a new suit against the bankrupt, is a question not now before us.

Exceptions overruled.

SWEET v. DUTTON.

(100 Mass. 589.)

Trust — "heirs" in deeds of personality mean personal representatives.

A by deed conveyed all her property, "both real and personal," to a trustee in trust, to pay the income to her during her life, and at her death to transfer the property as she should by will appoint, and in default of such will to convey the property to her "heirs at law." The trust property was all personal. A died intestate. *Held*, that the trust property being personalty, the word "heirs" meant the persons entitled to take under the statute of distributions, and that therefore the property went to A's husband, and not to her child.

BILL IN EQUITY by Charles A. Sweet against Horace Dutton and Martha S. Dutton for the construction of a deed of trust. The bill alleged that Martha G. Sweet, plaintiff's daughter, by deed of indenture, conveyed to plaintiff "all the property, both real and personal, of which I am now seized, or to which I am in any way entitled either in law or equity," in trust to pay the net income to her during her life, free from the control of any future husband she might have, and on her death to pay over and transfer all the property in his hands to such persons as she should by her last will or other instrument in writing appoint, and in default of such will or appointment, then "to convey and pay over the said trust property to her heirs at law;" that the deed contained the following provisions: "The said Martha G. Sweet hereby fully authorizes and empowers said Charles A. Sweet to sell, assign, grant and con-

Sweet v. Dutton.

vey or change the mode of investment of all or any part of said property, both real and personal, as he may in his judgment see fit, and execute all needful papers, under seal or otherwise, and invest the proceeds of the same as he may deem best; to have and to hold said proceeds so invested in trust, in the same manner and on the same terms as aforesaid." "The said Charles A. Sweet agree: to keep an account of said property, a schedule of which, as at present constituted, is hereunto annexed and marked A;" that the schedule annexed contained only bonds, railroad stock and bank stock; that the plaintiff took possession of the property therein described, and still holds the same; that Martha G. Sweet was afterward married to the defendant Horace Dutton, and died intestate June 25, 1871, leaving an infant child, Martha S. Dutton, the other defendant. The prayer was for instructions as to whether the trust property belonged to the husband or the child.

H. G. Parker, for Horace Dutton.

R. D. Smith, for the guardian *ad litem* of Martha S. Dutton.

CHAPMAN, C. J. By an indenture made between the plaintiff and his daughter, Martha G. Sweet, on December 24, 1868, she conveyed to him in trust all her property, to be held by him during her life, and to pay the income to her, free from the control and interference of any future husband she might have. Upon her death he was to pay over and transfer all the property in his hands to such person as she should by her last will or other instrument in writing appoint, and in default of such will or appointment, then to convey and pay over the said trust property to her heirs at law. The instrument purports to convey "all the property, both real and personal, of which I am now seized or to which I am in any way entitled, either in law or equity." A schedule of the property is annexed to the instrument, consisting of bonds, railroad stocks and bank stocks; and this is the only property which the plaintiff now holds. She was married to the defendant, Horace Dutton, and died on June 25, 1871, leaving her husband and an infant daughter. The object of the bill is to ascertain which of these persons is entitled to the property. If it were real estate, it would go to the daughter as heir; but the husband contends that, being personalty, it goes to him as distributee.

The meaning of the word "heirs" in a bequest of personal property has been much discussed in the cases cited, and in other cases cited in the text-books referred to. In *Gittings v. M'Dermott*, 2 Myl. & K. 69, and in some other English cases, it is said that the construction of the word must be governed by the nature of the property. In many cases this may be so, but not in all. The more comprehensive rule is, that it must be governed by the intent of the testator; and if his intent appears to be to designate those who are strictly his heirs in the primary sense of the term, and not distributees, it must be so construed; as in *De Bouvoir v. De Bouvoir*, 3 H. L. Cas. 524, and *In re Rootes*, 1 Drew. & Sm. 228, and other cases. This court so held in *Clarke v. Cordis*, 4 Allen, 466, 480. See also *Loring v. Thorndike*, 5 id. 257. But in *Houghton v. Kendall*, 7 id. 72, the court said that, when the word "heirs" is used in a gift of personalty, it should primarily be held to refer to those who would be entitled to take under the statute of distributions.

If, then, the instrument before us were a will, the word "heirs" ought, according to the whole course of the authorities, to be construed as meaning distributees, there being nothing to indicate a different meaning. The instrument, however, is not a will, but a transfer of personal property; and no authority has been cited, where the word has been used in such an instrument except in its primary signification. The question then arises, whether the extended signification is to be limited to wills. We think it is not.

In *Morton v. Barrett*, 22 Me. 257, 264, it is said that, to carry into effect the intent of the testator, the word "heirs" should be construed to mean heirs apparent, or children, or those entitled under the statute of distributions; and in *Mace v. Cushman*, 45 id. 250, 261, it is said that, in the common use of language, the children of a deceased intestate leaving personal property would be called his heirs, and such term would be justified by the definitions of the word "heirs" by lexicographers, but technically they would not take as heirs, but as distributees. In that case, the court held that the word was intended to mean the persons who were entitled to the property of the deceased according to the laws in force. The courts have extended its meaning in construing wills, because they found that testators so used it. Testators are apt to use words in a new sense, different from their original and technical meaning, when such new meaning has come into common use; and when it comes into common use, it is often adopted in other instruments.

According to *Mace v. Cushman*, cited above, this new meaning of the word "heirs," in application to personalty, has acquired a proper place in lexicography. This is according to the common course of change that is constantly going on in living languages.

In view of these circumstances, we think it is to be presumed that in this instrument the parties used the word in the same sense in which they would have used it in a will, and that the property should go to the distributee.

Decree accordingly.

INDEX.

ACCESSION.

See SALE, 187.

ACCRETION.

Rule as to the division of alluvial accretion. *Backholder v. Keniston* (N. H.) 143.

ACTION.

- 1 Declaration that defendant, the teacher of a high school, was requested by the school committee, whose own duty it was, to examine candidates for admission to such school and report upon their qualifications, that he undertook the duty, that plaintiff was examined and found qualified, but that defendant falsely and maliciously reported against him and he was excluded from the benefits of the school. On demurrer *held*, (1) that the declaration was good; (2) that the confidence reposed in the defendant by the committee to examine candidates, and his acceptance of the trust, created sufficient legal consideration to make it a duty to faithfully perform the same. *Hammond v. Hussey* (N. H.), 41.
2. The owner of one part of a building has no action to recover damages at law for the willful neglect of the owner of the other part in permitting his part to become ruinous and fall into decay, whereby the plaintiff's part is injured. *Pierce v. Dyer* (Mass.), 716.

ADJOINING OWNERS.

See ACTION, 716.

AGENCY.

1. Where one undertakes, voluntarily and without compensation, to perform an act requiring the trust and confidence of another, he is responsible for willful and malicious fraud in connection with the undertaking. *Hammond v. Hussey* (N. H.), 41.
2. An agent had authority to sell goods on commission for his principal; but no authority to sell otherwise than for cash. He did sell on credit and the goods were sent marked C. O. D. The carrier delivered the goods, without receiving the cash, on the written order of the agent. *Held*, that the carrier, who knew of the authority of the agent to sell, was not affected by the limitation of which he had no notice, and that the mark C. O. D. did not put him on inquiry, as a matter of law, but was a question to be determined by the jury. *Daylight Burner Co. v. Odlin* (N. H.), 45.
3. Authority of officers of a bank to release its creditors without payment *Cochecho National Bank v. Haskell* (N. H.), 87.

ALLUVION.

Where a new shore is formed on a river not navigable, by the alluvial deposit taken from the opposite side by the wearing away of the stream, the land on the new shore is to be divided between the owners entitled to it, according to the following rule: "Give to each owner a share of the new shore line in proportion to what he held in the old shore line and complete the division of the land by running a line from the bound between the parties on the old shore to the point thus ascertained on the new." *Bachelder v. Keniston* (N. H.), 143.

ALTERATION OF INSTRUMENT.

The maker of a promissory note, *held*, not discharged by the addition of the name of another as surety. *Miller v. Finley* (Mich.), 306.

ANIMALS.

See COMMON CARRIER, 375, 494.

ARSON.

A husband, living with his wife, and having a rightful possession jointly with her of a dwelling-house, which she owns and they both occupy, is not guilty of arson, by the common law, in burning such dwelling-house; and this rule is not changed by a statute securing to the wife her separate property. *Snyder v. People* (Mich.), 802.

ASSAULT AND BATTERY.

That defendant has been criminally proceeded against for an assault and battery is no bar, in an action of trespass, to allowing exemplary damages. *Hoadley v. Watson* (Vt.), 197.

ASSIGNMENT.

See REPLEVIN, 183.

ATTACHMENT.

See TENANTS IN COMMON, 624.

ATTORNEY AND CLIENT.

An attorney was employed to bring an action, the client agreeing to give or allow and pay him the first fifty dollars collected by him therein. *Held*, not champertous. *Scott v. Harmon* (Mass.), 685.

AUCTION.

Where several parcels of goods are sold at auction to the same purchaser, on separate bids, whether the contract is an entirety, or distinct as to each parcel. *Jennesse v. Wendell* (N. H.), 48.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 469.

BANKRUPTCY.

1. The indorser of a bill, who was induced to indorse it by the fraudulent representations of the drawer, was compelled to pay it, and recovered judgment against the drawer for the amount so paid. In an action on the judgment, defendant pleaded his discharge in bankruptcy. *Held*, that the debt sued on was not "created by fraud" within the meaning of the bankrupt act, and therefore that the plea was good. *Palmer v. Preston* (Vt.), 191.
2. A State court has no jurisdiction of a suit by an assignee to set aside a conveyance made by a bankrupt, in fraud of the bankrupt act. *Voorhies v. Frisbie* (Mich.), 291.
3. An assignee in bankruptcy may sue or be sued in the courts of the State, on claims for or against the estate of the bankrupt, our courts having concurrent jurisdiction with the U. S. courts in the premises. *Cogdell v. Ezum* (N. C.), 657.
4. A, a bankrupt, brings a suit in his own name against B, on the 19th day of September, 1870; on the 11th of March, 1872, A's assignee in bankruptcy, C, who was appointed on the 25th of February, 1869, is made party plaintiff in the suit commenced by A. *Held*, that the right of action against B accrued to C, the assignee, at the time of his appointment, and that the two years' limitation in the bankrupt act, of suits by assignees, was a bar. *Id.*
5. A sale of the land by the assignee of a bankrupt does not divest the lien of the State upon the land for taxes due on it, even though sold by the assignee, free of incumbrance. *Stokes v. State* (Ga.), 588.
6. Proving a debt for goods sold and delivered, in bankruptcy proceedings bars an action on the debt previously commenced. *Bennett v. Goldthwait* (Mass.), 742.

BANKS AND BANKING.

1. A cashier has no authority to bind the bank by a discharge of its debtors, without payment, or to release a surety by an agreement that he should not be called upon to pay a note that he was liable on in ordinary cases; but if, knowing one to be a surety upon a note, he inform him that such note is paid, intending him to believe it, and the surety, relying upon that statement, changes his position toward his principal by indorsing a new note or giving up his securities, the bank will be estopped from denying that the note is paid. *Cochecho National Bank v. Haskell* (N. H.), 67, and note, 75.
2. Plaintiff, the indorsee of an instrument drawn on a bank and directing it to "ninety days after date, pay to B. or order one thousand dollars," delivered it to defendant, a bank, for collection. At the expiration of the ninety days, defendant presented said instrument for payment, and protested it for non-payment without allowing days of grace. In an action against the bank for failing to have the instrument duly presented and protested, the drawers being insolvent, *held*, that the instrument was a bill of exchange and entitled to grace, and that the bank was liable for failing to have it duly presented and protested and notice given to the indorsers. *Georgia National Bank v. Henderson* (Ga.), 590.

8. A bank cannot, by assignment of its effects, choses in action, etc., deprive a maker of a note due the bank of his right to pay the same with the bills of the bank; nor can the bank, by any authority derived from the legislature, deprive the maker of such right of payment of a note due the bank, in bills of the bank. *Blount v. Windley* (N. C.), 616.

See PAYMENT.

BELLIGERENT RIGHTS.

See WAR.

BIGAMY.

See DIVORCE, 260.

BILL OF EXCHANGE.

See BANKS AND BANKING, 590.

BONA FIDE PURCHASER.

See FRAUD, 608.

BOND.

- The sureties to a bond are not holden if it be not executed by the person named as principal. *Russell v. Annable* (Mass.), 665.

BURDEN OF PROOF.

See CRIMINAL LAW, 200; NEGLIGENCE, 720.

CARRIER.

1. An express company had, by contract with a railroad company, the use of a car in which their agent rode without paying fare. The agent, without the authority of his employers, took the plaintiff with him in the car for the purpose of teaching him the business, and the conductor, supposing plaintiff to be an agent of the express company, suffered him to ride with out paying fare. An accident happening, plaintiff was injured. *Held*, that plaintiff was not a passenger, and could not maintain an action against the railroad company. *Union Pacific Ry. Co. v. Nichols* (Kans.), 475.
2. Plaintiff paid his fare on defendant's road to N. where the conductor agreed to let him off. The train did not stop at N. but only slackened speed. The plaintiff was afraid to get off. After the station was passed the conductor again slackened speed and directed the plaintiff to get off. He did so and was injured. *Held*, that these facts did not constitute negligence on the part of the plaintiff, and that the verdict of the jury awarding damages to plaintiff must be sustained. *Georgia Ry. Co. v. McOurdy* (Ga.), 577.

See COMMON CARRIER.

CASHIER.

See BANKS AND BANKING, 67.

CASTLE.

In what respect a man's house is his castle so as to justify the use of deadly weapons in its defense. *State v. Patterson* (Vt.), 200, and note, 212.

CATTLE.

See COMMON CARRIERS, 275, 404.

CHAMPERTY.

See ATTORNEY AND CLIENT, 685.

CHARTER.

See CORPORATION, 233.

CHATTEL MORTGAGE.

See MORTGAGE, 600.

CITIZENSHIP.

A person born in Canada of parents of African blood who were born in Virginia and held there as slaves until they emigrated to Canada, *held*, not entitled to vote as a citizen of the United States without being naturalized. *People v. Board of Registration* (Mich.), 297.

CIVIL RIGHTS.

A statute providing that colored people shall have equal privileges with white people in theaters, etc., is constitutional. *Donnell v. State* (Miss.), 875.

CIVIL WAR.

See WAR.

COMMON CARRIER.

1. Defendants, common carriers between P. & B., took a package at P. for B., a place in another State beyond their terminus. At B., the end of their line, according to custom they delivered it to another carrier and it was by him lost. *Held*, (1) that whether or not defendant undertook to carry the package beyond B. was a question of fact, and the judge who tried the facts having found that there was no such undertaking, a verdict for the defendant would not be set aside; (2) that if goods be lost *in transitu* from one State to another, the *lex loci* where the loss occurs governs the rights of the parties. The cases relating to the liability of carriers beyond their line considered. *Gray v. Jackson* (N. H.), 1, and note, 40.
2. An agent sold goods on credit. The principal sent them marked C. O. D. The carrier, on the written order of the agent, delivered the goods without receiving the cash. *Held*, that it was a question for the jury whether the mark C. O. D. was notice to the carrier of the agent's want of authority. *Daylight Burner Co. v. Odlin* (N. H.), 45.
3. Action on the case against a railroad company, as common carriers, for refusing to carry and for delay in carrying live stock. *Held*, (1) that carriers of live stock are not ordinarily common carriers; (2) that the burden of proof was upon the plaintiff that defendant had assumed to convey the stock as

- common carriers, or that they possessed the character of common carriers of live stock. *Lake Shore and Michigan Southern R. R. Co. v. Perkins* (Mich.), 275.
4. A railroad company, receiving cattle or live stock to be transported over its road from one place to another, assumes all the responsibility of common carriers, except so far as such responsibility may be modified by special contract. *Kansas Pacific Ry. Co. v. Nichols* (Kans.), 494, and note, 500.

COMMUTATION OF SENTENCE.

See PARDONS, 563, 699.

CONDITIONAL SALE.

See SALE, 187, 663.

CONFEDERATE GOVERNMENT.

An agent of the Confederate government drew a negotiable order on the war department, and it was indorsed to plaintiff for value. *Held*, illegal. *Oronly v. Hall* (N. C.), 597.

See WAR.

CONFISCATION.

Land was seized, confiscated and sold under the act of Congress of July 17, 1872, providing for the seizure and confiscation of "the property of rebels." *Held*, that only the life estate was seized and sold, and that a State statute limiting the right of action in such cases would not bar the right of the reversioner to recover possession of such land after the termination of the life estate. *Dewey v. McLain* (Kans.), 418.

CONFLICT OF LAWS.

Action on a promissory note of a married woman living in Mississippi, executed in Louisiana, where, for local reasons, the contract was valid and enforceable. *Held*, that the action could not be maintained in Mississippi, where a married woman was not personally liable on her contracts. *Bank v. Williams* (Miss.), 819.

CONSIDERATION.

1. The confidence induced by undertaking a service for another is a sufficient consideration to create a duty in the performance of it. *Hammond v. Hussey* (N. H.), 41.
2. Where the note or bill of a married woman is void when made, there is no consideration for a promise by her after her husband's death to pay the same. *Porterfield v. Butler* (Miss.), 839.

See CONTRACT, 597; PROMISSORY NOTE, 806.

CONSTITUTIONAL CONVENTION.

A constitutional convention has no power to grant, by ordinance or otherwise, new trials. *Lawson v. Jeffries* (Miss.), 843.

CONSTITUTIONAL LAW.

1. Where a railroad company, in constructing its road, cut through a ridge adjoining plaintiff's land, and as a result thereof such land was flooded, *held*, that this was a "taking of property" within the meaning of the constitution, and that the legislature could not authorize it without providing for compensation. *Eaton v. Boston, etc., R. R. Co.* (N. H.), 147.
2. A constitutional convention passed an ordinance granting new trials in certain cases. *Held*, that the ordinance was not a legislative act, and was void. *Lawson v. Jeffries* (Miss.), 842.
3. A statute incorporated a company to carry on the lottery business in the State for twenty-five years, the company paying the State a certain sum for the privilege. The amended constitution of the State, afterward adopted, prohibited lotteries. *Held*, that this was not impairing the obligations of a contract within the provision of the constitution of the United States. *Moore v. State* (Miss.), 387.
4. A State statute provided that people of color should have equal privileges and accommodations with white people in public conveyances, theaters, places of popular amusements, etc., and imposed a penalty for a violation of the act. *Held*, that the statute was constitutional, and that the conviction of the lessee of a theater for denying admission and equal accommodations to colored men should be affirmed. *Donnell v. State* (Miss.), 375.
5. A State legislature has the constitutional power to authorize counties and municipal corporations to subscribe for stock in railroad companies, and to issue bonds in payment therefor. *Commissioners of Leavenworth v. Miller* (Kans.), 425.
6. A State constitution provided that "the State shall never be a party in carrying on any work of internal improvement." *Held*, not to be a restriction on municipal corporations. *Id.*
7. Legislative power defined. *Id.*
8. The constitution and laws of a State exempted homesteads from executions for debts "heretofore or hereafter contracted." *Held*, void, in so far as they apply to contracts entered into or debts contracted before their passage, as in violation of the constitution of the United States. *Homestead Cases* (Va.), 507.
9. The homestead laws of North Carolina, being restrictions on former exemptions, do not impair the obligation of contracts, and are not unconstitutional as to prior contracted debts. *Garrett v. Cheshire* (N. C.), 647.
10. Plaintiff, on a judicial sale had in October, 1868, became security for the purchase price of a lot of slaves sold thereat. *Held*, that his bond was valid and its payment obligatory, notwithstanding the emancipation proclamation made before, and that it could be enforced after the adoption of the thirteenth amendment to the United States constitution. *Henderlite v. Thurman* (Va.), 526.
11. An act of the legislature authorized telegraph companies to construct their lines upon the right of way of the railroad companies of the State, and provided for an arbitration to assess damages therefor in case of disagreement, but made no provision for enforcing the award. *Held*, unconstitutional. *South Western R. R. Co. v. South Western, etc., Telegraph Co.* (Ga.) 585.

12. A statute prohibited the use, in cities and towns of a certain size, of any building not then so in use, for carrying on the "business of slaughtering cattle, sheep, or other animals, or for melting or rendering establishments, or for other noxious and offensive trades or occupations," without the permission of the mayor, etc. *Held*, a constitutional exercise of the police power of the legislature. *Inhabitants of Watertown v. Maye* (Mass.), 694.
13. The constitution forbid the governor to grant a pardon before conviction. *Held*, that a pardon after verdict and before sentence was valid. *Commonwealth v. Lockwood* (Mass.), 699.

See PARDONS, 563.

CONTRACT.

1. Whether, where at an auction sale one person, in separate bids, purchases several distinct lots of goods, the contract is entire or several. *Jenness v. Wendell* (N. H.), 48.
2. Defendant ordered, by sample, spirituous liquors of the traveling agent of a firm in another State where the sale was lawful, and they were put up marked to purchaser and shipped from the firm's place of business. *Held*, that the sale was made and the contract complete at the place of shipment, and that an action for the price could be maintained in New Hampshire. *Boothby v. Plaisted* (N. H.), 140.
3. Plaintiff's infant son purchased of defendant, and paid for, tobacco pipes. Plaintiff's wife tendered back to defendant the pipes and demanded the money. *Held*, that plaintiff could recover the money. *Sequin v. Peterson* (Vt.), 194.
4. A statute authorizing a company, for a consideration paid to the State, to carry on a lottery for a certain number of years, is not a contract, and may be repealed before the expiration of the time limited. *Moore v. State*, (Miss.), 867.
5. Defendant, having a claim against the United States, employed the plaintiff to collect it, agreeing to pay him therefor twenty per cent of the claim when collected. The United States paid the money to defendant. In an action by the plaintiff for his percentage, *held*, that the agreement was in contravention of the act of congress to prevent frauds upon the treasury (10 U. S. Stat. at Large, 170, § 1), and was therefore void. *Jones v. Blackledge* (Kans.), 503.
6. Where an agent of the war department of the Confederate government issued the following instrument: "Confederate States Depository, Wilmington, pay Messrs. Collie & Co., or order, twenty thousand dollars," which was indorsed by the payees to the defendant, who indorsed it to another person, by whom it was indorsed to the plaintiff, it was *held* (RODMAN, J., dissenting), that the instrument was illegal; that such illegality was apparent upon its face, and extended to all the indorsements. *Cronly v. Hall* (N. C.), 597.

See EVIDENCE, 55; HOMESTEAD EXEMPTIONS, 507, 647; HUSBAND AND WIFE,

CONTRIBUTION.

See GENERAL AVERAGE, 725.

CONVEYANCE.

- A** person having no title or interest in a certain tract of land, executed a deed thereof without covenants of seizin or warranty, using as words of conveyance the words, "grants, bargains, sells, aliens, releases, quit-claims and conveys." Afterward the grantor acquired title to the land and conveyed it to defendant, who purchased with knowledge of plaintiff's deed. *Held*, that the deed to plaintiff was a quit-claim deed, and that the grantor's after-acquired title did not inure to the benefit of plaintiff. *Bruce v. Luke* (Kans.), 491.

CORPORATION.

1. The charter of a corporation contained a provision that it should not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act." *Held*, that such violation must be made to appear by the judgment of a court, and could not be adjudged by the legislature. *Flint & Fentonville Plank-road Co. v. Woodhull* (Mich.), 233.
2. A corporation chartered in Indiana, *held* to have power to purchase and hold lands in Michigan without any statute of the latter State affirmatively authorizing it. (CAMPBELL, J., dissenting.) *Thompson v. Waters* (Mich.), 248.
3. A sale of shares in a company carries with it dividends already declared but to be paid subsequently. *Burroughs v. North Carolina Railroad Co.*, (N. C.), 611.
4. Where the property of a corporation consists wholly of real estate and a part thereof is taken by eminent domain, the compensation therefor, if distributed as a dividend, is capital and not income. *Heard v. Eldridge* (Mass.), 687.

COVENANT.

- Action** of covenant for rent by lessor against lessee, on a lease by deed-poll, signed and sealed by the lessor only, and which the lessee had accepted and occupied under. *Held*, that the action would not lie. *Johnsons v. Muzzy* (Vt.), 214.

CRIMINAL LAW

1. On the trial of an indictment for homicide, where the facts proved by the prosecution show that the defendant claimed to do the act resulting in death in self-defense, the burden of proof rests upon the prosecution to show, beyond reasonable doubt, that the act was criminal. *State v. Patterson* (Vt.), 200.
2. A statute provided that "the granting of a new trial places the parties in the same position as if no trial had been had." Defendant was convicted of manslaughter, on an information charging murder; and a new trial was granted on his own motion. *Held*, that the defendant had waived the constitutional safeguard against being twice put in jeopardy for the same offense, and that on the second trial he could be convicted of murder. *State v. McCord* (Kans.), 469; *sed contra*, note, 473.
3. A judge cannot require a grand jury to have witnesses examined publicly. *State v. Branch* (N. C.), 633.

- 4 To make profane swearing a nuisance, the profanity charged must be uttered in the hearing of divers persons; and it must be charged in the bill of indictment, and proved to have been so uttered. The general allegation *ad commune nocumentum* is insufficient. *State v. Pepper* (N. C.), 637.
- 5 Hence, where the indictment is alleged that the defendant "in the public street of the town of L., with force and arms, and to the great displeasure of Almighty God, and the common nuisance of all good citizens of the State then and there assembled, did for a long time, to wit: For the space of twelve seconds, profanely curse and swear, and take the name of Almighty God in vain, to the common nuisance, etc. Held, that no criminal offense was therein charged. *Ib.*
- 6 If a person receives stolen goods, knowing them to be such, not for the purpose of making them his own, or of deriving profit from them, but simply to aid the thief in carrying them off, he is guilty of the crime of receiving stolen goods, knowing them to have been stolen. *State v. Rushing* (N. C.), 641.

See ARSON, 302; DEFENSE OF HOUSE, 200; INDICTMENT; RAPE, 283.

DAMAGES.

1. Where a vendee refuses to complete a contract, for the purchase of real estate, the measure of damage to the vendor is the difference between the contract price and the value of the real estate, when the vendee refused to complete. *Griswold v. Subin* (N. H.), 78.
2. In trespass for assault and battery, the fact that the defendant has been tried in a criminal proceeding for the same act is no bar to, or mitigation of exemplary damages; but plaintiff's expenses in the suit, not taxable costs are not proper items of such damages. *Hoadley v. Watson* (Vt.), 197 and note, 199.

DEED.

When deed treated as a mortgage. *Campbell v. Dearborn* (Mass.), 671.

See CONVEYANCE.

DEFENSE OF HOUSE.

See SELF-DEFENSE, 200

DELIVERY.

See SALE.

DEMAND.

See INFANCY, 194.

DISCLOSURES.

See PRIVILEGED COMMUNICATIONS, 736.

DIVIDENDS.

A sale of shares of stock in a railroad company carries with it the dividends declared by the company, when they are to be paid at a day subsequent

to the transfer of the stock. Therefore, when the North Carolina Railroad Company declared a dividend on the stock in said company, on the 16th day of February, 1870, to be paid on the 1st days of April and July thereafter, and the owner of certain shares of such stock sold and transferred the same on the 17th day of February. *Held*, that the purchaser of said shares of stock acquired the dividends, as well as the stock. *Burroughs v. North Carolina R. R. Co.* (N. C.), 611.

See CORPORATION, 687.

DIVORCE.

1. Courts have the same power over judgments in divorce suits as in other cases, and will vacate and set aside a decree that has been obtained by fraud or imposition. *Adams v. Adams* (N. H.), 184.
2. To an indictment for bigamy defendant set up a divorce obtained by his first wife in Indiana. The record in the divorce case recited that the parties were residents of Indiana. *Held*, (1) that the evidence was admissible to show that they were not such in fact; (2) that if the parties were not such residents the divorce was void and no defense to the indictment. *People v. Dawell* (Mich.), 260, and note, 274.

DRUNKENNESS.

That the maker of a promissory note was drunk when he executed it is no defense in the absence of proof of fraud or of his absolute incapacity. *Miller v. Finley* (Mich.), 306.

DYING DECLARATIONS.

See EVIDENCE, 200.

EASEMENTS AND SERVITUDES.

1. Plaintiff's ancestor gave to persons through whom defendants derive title a license by parol, to back water upon his land by damming a stream for a mill power. Under this license the defendants and their predecessors built the dam and a mill by the dam site, at an expense of \$15,000, for the purpose of enjoying the easement. Plaintiff brought suit at law for the trespass. *Held*, (1) that the easement was permanent in its nature, and the license should have been in writing, under the statute of frauds; (2) that investments of magnitude having been made by defendants and their predecessors, under such license they were in equity entitled to a grant as of specific performance; (3) that such an equitable defense might be sustained to defeat the plaintiff's action at law. *Cook v. Pridgen* (Ga.), 582.
2. The owner of one part of a building has no action against the owner of the other part for willfully permitting his part to get out of repair, whereby the plaintiff's part is injured. *Pierce v. Dyer* (Mass.), 716.

ELECTION.

At an election the person receiving the highest number of votes was disqualified. The person who had received the next highest number, and who was qualified, claimed the office. *Held*, that the electors had failed to

make a choice, and that he was not entitled to the office. *Sublett v. Betwell* (Miss.), 838, and note, 841.

See CITIZENSHIP, 297.

EMANCIPATION.

See PARENT AND CHILD, 886.

EMANCIPATION PROCLAMATION.

See CONSTITUTIONAL LAW, 536.

EMINENT DOMAIN.

An act authorising a telegraph company to erect its line upon the right of way of a railroad company, without providing for enforcing payment of damages, is unconstitutional. *Southwestern R. R. Co. v. Southwestern Telegraph Co.* (Ga.), 585.

EQUITY.

Power of a court of equity to treat a deed absolute as a mortgage, considered. *Campbell v. Dearborn* (Mass.), 671.

ESTOPPEL.

1. When a bank is estopped by the statements of its cashier to a surety. *Cocheco Nat. Bank v. Haskell* (N. H.), 67, and note, 75.
2. Defendant caused plaintiff's goods to be attached, relying on his representations that they were the property of another. *Held*, that plaintiff was estopped to show that his representations were false, though made without notice of the debt due the attaching creditor and without any intention to deceive him. *Horn v. Cole* (N. H.), 111.

EVIDENCE.

1. Where the mutual understanding of the parties is to determine the existence of a contract, evidence of their individual understandings is admissible. *Prescott v. Locks* (N. H.), 55.
2. In order to make dying declarations admissible in evidence, it is not necessary that the declarant state every thing constituting the *res gestæ* of the subject of his statement; but only that his statement of any given fact be a full expression of all that he intended to say as conveying his meaning as to such fact. *State v. Patterson* (Vt.), 200.
3. In an action against a railroad company to recover for injuries received by a car getting off the track, *held*, that the fact that the car left the track was evidence of negligence, and cast the burden of proof on the defendant. *Frital v. Middlesex R. R. Co.* (Mass.), 720.
4. When evidence of contemporaneous frauds admissible to prove fraud charged. *Jordan v. Osgood* (Mass.), 731.

See RETURN, 466.

EXECUTOR AND ADMINISTRATOR.

A guardian appointed in one State cannot maintain, as such, a suit against an executor or administrator appointed in another State. *Leonard v. Putnam* (N. H.), 106.

See WAR.

EXEMPLARY DAMAGES.

See DAMAGES, 97.

EXEMPTIONS.

1. Laws exempting homesteads from execution for debts "heretofore contracted," are unconstitutional. *Homestead Cases* (Va.), 567.
2. The homestead laws of North Carolina held constitutional as to prior debts, as being restrictions on former exemptions. *Garrett v. Ochsire* (N. C.), 647.

FACTOR.

See AGENCY.

FIRE.

1. Regulation of the erection and alteration of buildings in a city for the prevention of fires. *Welch v. Hotchkiss* (Conn.), 383.
2. The servants of a railroad company ran over and severed a hose laid across the railroad track to supply water to extinguish a fire in plaintiff's house. As a probable result of such act plaintiff's house was destroyed. *Held*, that the company was liable. *Metallic Compression Co. v. Fitchburg R. R. Co.* (Mass.), 689.

FIRE LIMITS.

See MUNICIPAL CORPORATIONS, 576.

FIXTURES.

Portable hot-air furnaces used for warming a dwelling-house, set in pits prepared for them in the cellar, and kept in place by their own weight, are part of the realty; as also are the pipes leading from the furnaces to the chimney. *Stockwell v. Campbell* (Conn.), 393.

FORMER ACQUITTAL.

See CRIMINAL LAW, 469.

FRAUD.

1. To sustain a defense of fraudulent representation it is insufficient to show that the representations made were simply false. Fraudulent intent in the party making them must be shown. *Griswold v. Sabin* (N. H.), 76.
2. In replevin of goods alleged to have been procured by the defendant of the plaintiff, on credit, by means of false and fraudulent representations as to his pecuniary condition, and also with intent not to pay for them. *Held*, that evidence of another act of fraud committed, about the same time, by the defendant, was not admissible to prove the fraud charged, unless there was evidence that the two were parts of one scheme of fraud committed in pursuance of a common purpose. *Jordan v. Osgood* (Mass.), 731.
3. *Held*, also, that the books of the bank where the defendant kept his deposit, supported by the oath of the book-keeper, were admissible to show what money he had in the bank at the time. *Id.*
4. A father, though insolvent, may in good faith give his minor son his time and future earnings. *Atwood v. Holcomb* (Conn.), 386.

5. A fraudulent grantee of land conveyed it to a *bona fide* purchaser for value, without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and tested of the term where it was obtained. *Held* (BOYDON, J., dissenting), that the title of the *bona fide* purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor. *Young v. Lathrop* (N. C.), 608.

See REPLEVIN, 182; STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See FRAUD, 608.

FRAUDULENT REPRESENTATIONS.

See FRAUD.

GENERAL AVERAGE.

- A bark being in inevitable danger, without her fault, of collision with a steamer, changed her course so as to strike the steamer stem on, thereby probably saving herself from being sunk with her cargo. In consequence of the collision she was obliged to go for repairs into a port of a country where the duty of a steamer to keep out of the way of a sailing vessel was not recognized, and where she was compelled, at the suit of the owner of the steamer, by a decree of court, to bear half the damage to both vessels, and, therefore, to pay a certain sum to the steamer. In a suit in equity by the owner of the bark against the owners of her cargo for contribution, *held*, that neither the expenses of the repairs rendered necessary by the collision, nor the sum paid to the steamer, nor the costs of defending the suit, was a subject for general average. *Emery v. Huntington* (Mass.), 735.

GRAND JURY.

- A judge of the superior court has no right to require a grand jury to have the witnesses on the part of the State examined publicly. *State v. Branch* (N. C.), 688.

GUARDIAN AND WARD.

- Where plaintiff, an infant, brought suit by his guardian appointed in another State against the administrator of his father, *held*, (1) that the rights and powers of guardians do not extend over the persons and property of their wards in other States; (2) that the domicile of the deceased is the place of primary and exclusive probate jurisdiction in the settlement of his estate. *Leonard v. Putnam* (N. H.), 106.

HIGHWAY.

- Objects in a highway likely to frighten horses of ordinary gentleness may be nuisances. *Ayer v. City of Norwich* (Conn.), 896.

HOMESTEAD EXEMPTION LAWS.

1. Laws exempting homesteads from execution for debts "heretofore contracted," *held*, in violation of the constitution of the United States. *Homestead Cases* (Va.), 507.

- The homestead exemption law of North Carolina held constitutional as to debts previously contracted on the ground that it was a restriction on former exemptions. *Garrett v. Cheshire* (N. C.), 647.

HOMICIDE.

When the burden rests on the prosecution to prove that a homicide was criminal. *State v. Paterson* (Vt.), 200.

HOUSE.

How far a man is justified in defending his house by means of deadly weapons. *State v. Patterson* (Vt.), 200, and note, 212.

HUSBAND AND WIFE.

1. A corporation of Louisiana, authorized by its charter to lend money to the "agricultural interest, on notes and mortgages," and to make such contracts with married women, and to enforce the same against their property, brought an action on such a contract made in that State, against a married woman in another State, where she lived, and by the laws of which she was not personally liable on her contracts. *Held*, that the action could not be maintained. *Bank v. Williams* (Miss.), 819.
2. A married woman gave a promissory note in payment of her husband's debts, without, in terms, making it a charge upon her separate estate. *Held*, that an action could be maintained against her on said note and her separate estate applied in payment of the same. *Deering v. Boyle* (Kans.), 480.
3. In an action on a bill of exchange, accepted by a married woman in payment for property purchased by her, the defendant pleaded coverture at the date of the acceptance; replication that defendant, after her husband's death, promised to pay the bill. *Held*, that the replication was bad; the acceptance being void when made, there was no consideration for the subsequent promise. *Porterfield v. Buller* (Miss.), 329.

See ARSON, 302.

ILLEGAL CONTRACTS.

See CONTRACTS.

INDICTMENT.

Information for larceny of "one hundred and thirty-five dollars of the property, goods and chattels" of C. *Held* bad for uncertainty. *Mervin v. People* (Mich.), 814.

INFANCY

Plaintiff's infant son bought of the defendant cigar-holders and tobacco-pipes and paid for them. Afterward, plaintiff's wife — the mother of the child — went with the boy to defendant, tendered back the article, and demanded the money paid for them, which was refused. *Held*, that plaintiff could recover the money, and that demand by plaintiff's wife was sufficient. *Seguin v. Peterson* (Vt.), 194.

INFORMER.

See PRIVILEGED COMMUNICATIONS, 736.

INSURANCE.

Defendants, in their policy, reserved the right to cancel them, "on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term." Before a loss occurred the policy was returned for cancellation to the company's agent, who notified plaintiff's agent that he was ready to pay the unearned premium, but he did not in fact pay it until a month subsequent; in the meantime the loss occurred. *Held*, that these facts did not relieve the company of their liability, and that plaintiffs could recover. *Hollingsworth v. Germania Ins. Co. (Ga.)*, 573.

INTEREST.

When a promissory note is given, with a stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest, as if he had given a promissory note for the amount of such interest. By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest. *Bledsoe v. Nixon (N. C.)*, 642.

INTERROGATORIES.

See PRIVILEGED COMMUNICATIONS, 736.

JUDGMENT.

Judgments in divorce suits, as in other cases, may be impeached and set aside for fraud. *Adams v. Adams (N. H.)*, 134.

See DIVORCE, 260.

JUDICIAL NOTICE.

Courts will take judicial notice of acts creating municipal corporations. *Prell v. McDonald (Kans.)*, 423.

JURISDICTION.

1. The domicile of a deceased person is the place of primary and exclusive jurisdiction in the settlement of his estate. *Leonard v. Putnam (N. H.)*, 106.
2. A State court has no jurisdiction of a suit, by an assignee in bankruptcy, to set aside a fraudulent conveyance. *Voorhies v. Frisbie (Mich.)*, 391.
3. An assignee in bankruptcy may sue or be sued in the State courts, on claims for or against the bankruptcy estate. *Cogdell v. Brum (N. C.)*, 657.

See DIVORCE, 260.

JURY.

See TRIAL, 200.

LANDLORD AND TENANT.

Right of landlord entitled to possession, to enter by force and remove the tenant. Cases considered *arguendo*. *Sterling v. Warden (N. H.)*, 80.

See COVENANT, 214.

LARCENY.

See INDICTMENT.

LEGISLATIVE POWER.

1. Neither a legislature nor a constitutional convention has power to grant new trials. *Lawson v. Jeffries* (Miss.), 342.
2. Legislative power defined. *Com'r of Leavenworth v. Miller* (Kans.), 495

LEX LOCI.

Where goods are lost by a carrier *in transitu* from one State to another, the *lex loci*, where the loss occurs, governs the rights of the parties. *Gray v. Jackson* (N. H.), 1.

See CONFLICT OF LAWS, 819; CONTRACTS.

LICENSE.

To enter upon property; cases considered. *Sterling v. Warden* (N. H.), 80.

LIEN.

See TAXES, 588.

LIMITATION OF ACTIONS.

See CONFISCATION, 418.

LIQUOR.

See WITNESS.

LOCAL AID.

See CONSTITUTIONAL LAW, 425.

LORD'S DAY.

See SUNDAY.

MALICIOUS PROSECUTION.

Declaration alleging that defendant maliciously, and without probable cause, procured the arrest and holding to bail of plaintiff, on a writ in a civil action, returnable at a certain time, at which the plaintiff appeared, but defendant did not nor was said writ ever returned. Demurrer on the ground that it appeared that the suit alleged to be malicious was not determined in favor of the defendant therein by a judgment of the court. *Held*, that the declaration was good. *Cardinal v. Smith* (Mass.), 682.

MARRIED WOMAN.

The promissory note of a married woman, given in payment of her husband's debts, may be enforced against her, though not in terms made a charge upon her separate estate. *Deering v. Boyle* (Kans.), 480.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

The conductor of a train ordered a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars. The boy refused, but on being threatened by the conductor, uncoupled the cars, and in doing so was injured. *Held*, that the railroad company was not liable. *New Orleans, etc., R. R. Co. v. Harrison* (Miss.), 856.

MEMORANDUM.

See STATUTE OF FRAUDS, 873.

MISTAKE.

1. A voluntary payment, with a knowledge of all the facts, cannot be recovered back, although there was no debt; a payment, under a mistake of fact, may. *Adams v. Reeves* (N. C.), 627.
2. If one, knowing that he has no claim upon another, sues out legal process against him and seizes his person or property, and the defendant, acting upon the false representations of the plaintiff, and not being able at the time, by reasonable diligence, to know or to prove that such representations are false, pays the demand, he may recover it back in a subsequent action. *Id.*

MORTGAGE.

1. A mortgage by a buggy-maker of "ten new buggies," without delivery of possession, he having more than ten on hand at the time, *held* ineffectual to pass title to any particular buggies or to any interest in the buggies on hand; and the mortgagee cannot maintain an action for the recovery of ten new buggies in the possession of the mortgagor, or his personal representative. *Blakely v. Patrick* (N. C.), 600.
2. The mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land for unpaid taxes. *Whitehurst v. Gaskill* (N. C.), 655.
3. Plaintiff bought land with money borrowed from the defendant, and then conveyed it to defendant by deed absolute; but both parties understood that the conveyance was intended as security for the loan. *Held*, that on parol proof of these facts plaintiff was entitled to maintain a bill in equity to redeem the land as from a mortgage. *Campbell v. Dearborn* (Mass.), 671.

MUNICIPAL CORPORATION.

1. A municipal corporation was authorized by its charter to make by-laws regulating the erection of buildings. *Held*, that a by-law requiring a building license and imposing a license fee was valid. *Welch v. Hotchkiss* (Conn.), 383.
2. Plaintiff declared against the corporation of Atlanta, alleging that it had by ordinance defined fire limits in the city within which the erection of wooden buildings were prohibited. That while the ordinance was in force the city council authorized F. to erect a wooden building in the said limits which taking fire caused the destruction of plaintiff's building. *Held*, on demurrer, that the action could not be maintained. *Forsyth v. Mayor* (Ga.), 576.

3. Acts creating municipal corporations are public acts, of which courts will take notice without proof. *Prell v. McDonald* (Kans.), 428.
4. A legislature may authorize municipal corporations and subscribe for stock in railroads and to issue bonds therefor. *Comr. of Leavenworth v. Miller* (Kans.), 425.

NAME.

Under what circumstances a name will be protected as a trade-mark. See note, 410.

NEGLIGENCE.

1. In order to extinguish a fire in plaintiff's building it was necessary to, and firemen did, lay a hose across defendants' railroad. Defendants' servants, with notice of the presence of the hose, and although having time to stop the train until the hose could be uncoupled, ran a train over and severed the hose, thereby cutting off the water from the fire which otherwise might and probably would have been extinguished, and the building was consumed. *Held*, that the hose was lawfully laid across the track, and that the act of the defendants' servants was the proximate cause of the destruction of the building, and that the defendants were liable. *Metallic Compression Casting Co. v. Fitchburg R. R. Co.* (Mass.), 689.
2. In an action against a railroad company to recover for injuries occasioned through its alleged negligence, *held*, (1) that the fact that the defendant had leased that part of the road where the accident happened, without authority of law, was no defense, and, (2) that although the burden was on the plaintiff to prove the defendant's negligence, yet proof that the injury was caused by the cars running off the track was evidence of negligence sufficient to charge defendant in the absence of explanation. *Foital v. Middlesex R. R. Co.* (Mass.), 720.

See CARRIER, 577.

NEW TRIAL.

1. An ordinance of a constitutional convention, granting new trials in certain cases, is void. *Lawson v. Jeffries* (Miss.), 342.
2. Where, under an indictment for murder, the defendant is convicted of manslaughter, and a new trial is granted on his motion, he may at the second trial be convicted of murder. *State v. McCord* (Kans.), 469; *sed contra*, note, 478.

NUISANCE.

1. Objects within the limit of a highway which, in their nature, are calculated to frighten horses of ordinary gentleness, may be nuisances which make the highway defective within the meaning of a statute requiring towns to keep their highways "in good and sufficient repair." Whether in any case such an object is a nuisance, is a question of fact for the jury. *Ayer v. City of Norwich* (Conn.), 896, and note, 400.
2. The disturbance of a religious congregation by singing, when the singer does not intend so to disturb it, but is conscientiously taking part in the religious services, may be a proper subject for the discipline of his church, but is not indictable. *State v. Linkshaw* (N. C.), 645.

INDEX.

OFFICE.

See ELECTION, 838.

ORDINANCE.

See MUNICIPAL CORPORATION.

PARDONS.

1. The governor of Virginia commuted defendant's sentence for a felony (three years in the penitentiary), to one year in jail, with the consent of the prisoner. *Held*, (1) that the governor had the constitutional authority to do such an act; (2) that the act was a conditional pardon and not a commutation, as it substituted a different punishment; (3) that the prisoner could be lawfully held to the performance of the condition. *Lee v. Murphy* (Va.), 568.
2. The constitution of Massachusetts placed in the governor the power of pardoning offenses, but provided that no pardon before conviction should avail the party pleading the same. *Held*, that a pardon granted after verdict of guilty and before sentence was valid. *Commonwealth v. Lockwood* (Mass.), 699.

PARENT AND CHILD.

- A father, although insolvent at the time, may make, in good faith, a valid gift to his minor son of his time and future earnings. *Atwood v. Holcomb* (Conn.), 886.

PAROL EVIDENCE.

See MORTGAGE, 671.

PARTNERSHIP.

1. One Harrington gave the plaintiff a note signed "Hill & Co. by Harrington." There never existed any such firm as "Hill & Co.," nor were Hill and Harrington ever partners; but some time before the note was given, Hill was informed that Harrington was using his name, and he thereupon told Harrington that he "must not use that name to injure him," and Harrington said he would not. Hill did not know of the giving of the note to plaintiff, nor did plaintiff know of the previous use by Harrington of Hill's name. *Held*, that Hill was liable on the note. *Smith v. Hill* (Vt.), 189.
2. In a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, both partners were named as principals, but the bond was executed by only one of them, in the name of the firm. *Held*, that it could not be enforced against a surety without proof of the assent of the other partner to its execution. — *Wells, J.*, dissenting. *Russell v. Annable* (Mass.), 665.

PASSENGER.

See CARRIER, 475.

PAYMENT.

1. Where one pays a debt after service of a writ on him, and before trial, the plaintiff cannot proceed for costs. *Buell v. Flowers* (Conn.), 414.

2. The maker of a note due a bank has the right to tender in payment of such note, as equivalent to gold and silver coin, the bills issued by the bank. *Blount v. Windley* (N. C.), 616.

See MISTAKE, 627.

PHYSICIAN.

Plaintiff, a physician, being about to remove from the town where he lived agreed with defendant, also a physician, in consideration of \$500, to recommend him to his patients, and to use his influence to induce them to employ him. *Held*, that the agreement was lawful, and not against public policy. (PARK and SEYMOUR, JJ., dissenting.) *Hoyt v. Holly* (Conn.), 390.

POLICE POWER.

See CONSTITUTIONAL LAW. 694.

POSTMASTER.

Right of to take public property from his predecessor. *Sterling v. Warden* (N. H.), 80.

PRINCIPAL AND AGENT.

See AGENCY; MASTER AND SERVANT.

PRIVILEGED COMMUNICATIONS.

In an action for falsely and maliciously representing to the treasury department of the United States that the plaintiff was intending to defraud the revenue, the plaintiff filed interrogatories requiring the defendant to answer whether he did not inform the department that he knew or believed that plaintiff was intending to commit a fraud upon the revenue. *Held*, that any communications of the kind to the department were privileged in the sense that their disclosure will not be compelled or permitted without the assent of the government, and that defendant would not be compelled to answer the interrogatories. *Worthington v. Scribner* (Mass.), 736.

PROFANE SWEARING.

See CRIMINAL LAW, 637.

PROMISSORY NOTES.

1. In an action by a holder in good faith against the maker, on a promissory note given for an interest in a patent right, *held*, (1) that evidence of the worthlessness of the patent was inadmissible under the general issue; (2) that the maker was not discharged nor his liability affected by the addition of the name of another as surety; (3) that the drunkenness of the maker was not a defence in the absence of proof of fraud, or of his absolute incapacity; and (4) that the note being fair on its face, it could only be impeached in the hands of a holder for value, by evidence of bad faith. *Müller v. Finley* (Mich.), 306.
2. A married woman is liable on her promissory note given in payment of her husband's debts, although it is not made a charge upon her separate estate. *Deering v. Boyle* (Kans.), 480.

3. The maker of a note due a bank has the right to pay it in bills issued by the bank. *Blount v. Windley* (N. C.), 616.
4. A promissory note given to an insurance company, and otherwise negotiable, bore on its face the words: "On policy No. 88, 886." *Held*, negotiable; and this, although the policy contained a provision for the set-off of notes due in case of loss. *Taylor v. Curry* (Mass.), 661.

See HUSBAND AND WIFE.

PROTEST.

See BANKS AND BANKING, 590.

PROXIMATE AND REMOTE CAUSE.

Where a man cuts off the hose through which firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water, his act is regarded as the direct and efficient cause of the injury. *Metallic Compression Co. v. Fitchburg R. R. Co.* (Mass.), 689.

PUBLIC POLICY.

Plaintiff, a physician, sold his good will to defendant, another physician, and agreed to use his influence to induce his patients to employ the defendant. *Held*, not to be against public policy. *Hoyt v. Holly* (Conn.), 890.

RAILROAD.

1. A person released a railroad corporation from all claim of damages, on account of the construction of the road over his land. *Held* not to operate against his claim for damages resulting from the roads being built over the land of another. *Eaton v. Boston, Concord, etc., R. R. Co.* (N. H.), 147.
2. A railroad company claiming authority from the legislature, cut through a ridge near plaintiff's lands, and as a result thereof, such lands were flooded by freshets when they had formerly been protected from them. *Held*, that this was taking of the property of plaintiff within the meaning of the constitution, and that the legislature could not authorize the same without providing for compensation, and that due care and prudence in the construction of the road where the barrier was broken down would not protect the company. *Ib.*
3. A boy, not in the employ of the railroad company, was directed by a train conductor to uncouple cars. In so doing he was injured. *Held*, that the company was not liable. *New Orleans, etc., R. R. Co. v. Harrison* (Miss.), 856.
4. A State legislature has the power to authorize municipal corporations to subscribe for stock in railroads, and to issue bonds therefor. *Commissioners of Leavenworth v. Miller* (Kans.), 425.
5. Defendant was indicted, under a statute, for obstructing a railroad train, and endangering the safety of the passengers. The evidence showed that he was a passenger on the train; that he pulled a signal rope attached to a bell upon the engine, thereby causing the train to be stopped, and the safety of the passengers to be endangered. *Held*, that the indictment was not maintained. *Commonwealth v. Killian* (Mass.), 714.

RAPE.

On the trial of an indictment for rape the jury were instructed that they might convict if they found that defendant procured the woman to have connection with him by fraudulent representations, which she believed that it was a necessary part of his medical treatment of her. *Held*, error, for the reason that it did not recognize force as an essential element of the crime. *Don Moran v. People* (Mich.), 288, and note, 290.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW, 641.

REMOVAL OF CAUSE.

1. In an action pending in a State court, in which some of the plaintiffs were non-residents of the State and the others residents, the non-residents moved to have the cause removed into the United States circuit court, under act of congress of March 2, 1867. *Held*, that the cause could not be removed. *Beery v. Irick* (Va.), 539, and note, 545.
2. A cause cannot be removed from a State to a Federal court, pending an appeal from a decree upon the merits. *Id.*
3. An administrator filed a bill to marshal assets against creditors, some of whom had commenced suits at law. An injunction was allowed, conditioned to allow the claims to be litigated to ascertain the amounts due, the priority of the claims, and the right to payment out of the funds. One of the creditors resided in another State, and made application to have his action at law removed to the United States court. *Held*, that the cause was not subject to removal, as it was merely collateral to the suit in equity. *Burtis v. Loyd* (Ga.), 574.

REPLEVIN

The vendor of goods who has been induced to part with them through such fraud on the part of the vendee as annuls the sale, may replevy them of the vendee's general assignee. *Farley v. Lincoln* (N. H.), 182.

RETURN.

The sheriff's return on a summons was that he had served it by leaving a copy thereof at the usual place of residence of the defendant. On a motion to set aside the return, *Held*, that evidence was admissible to show that the place where the summons was left was not the defendant's residence. *Bond v. Wilson* (Kans.), 466.

SABBATH.

See SUNDAY.

SALE.

1. Whether a sale at auction of distinct parcels of goods to the same purchaser, on separate bids, is an entire or several contract. *Jennesse v. Wendell* (N. H.), 48.
2. Defendant agreed orally to buy of plaintiff what walnut spokes he should saw at his mill, not exceeding 100,000, at \$40 per thousand, to be delivered

at the mill in lots of about 10,000 each, subject to defendant's selection each lot to be paid for on delivery. Nothing was said about counting, but each party understood that he was to count them after selection. The defendant selected the first lot but did not count them. The plaintiff afterward counted those selected and charged them to defendant, but did not inform defendant of the number. The spokes having been burned, *held*, in an action for their value, that the sale was not perfected, and that the title to the property remained in plaintiff. *Prescott v. Locke* (N. H.), 55.

3. To place articles sold at buyer's risk, delivery and acceptance must be such that nothing remains to be done by either party in respect to them, and where the sale is of a quantity of things by count, measure or weight, their number, quantity or weight must be determined before the sale is perfect, in the absence of an express intention to the contrary; and the same rule applies when delivery is to be made of the sold articles by installments. *Id.*
4. Defendant ordered, by sample, liquors of plaintiff's agent. The order was sent to plaintiff, and the goods were by him shipped to defendant. The defendant lived and the order was given in a State where the sale of liquors was unlawful. Plaintiff lived in and the goods were shipped from a State where such sale was lawful. *Held*, that the sale was made in the latter State, and that plaintiff could recover the price in an action in the courts of the former State. *Boothby v. Plaisted* (N. H.), 140.
5. Where goods are purchased by means of such fraud on the part of the vendee as renders the sale void, and are transferred by a general assignment, the vendor may replevy the goods of the assignee. *Farley v. Lincoln* (N. H.), 183.
6. B. sold a wagon to H. on condition that it should remain the property of B. till paid for. Plaintiff repaired it for H. by putting in new wheels and axles. H. took it from plaintiff's possession without his knowledge or consent, and afterward agreed with plaintiff that the "running part" of said wagon should remain the property of plaintiff until paid for. H. never paid either B. or plaintiff, and neither had notice of the other's claim. B. took the wagon back from H. and sold it to defendant, who did not know of plaintiff's claim. *Held*, that defendant was liable in trover for the wheels and axles. *Clark v. Wells* (Vt.), 187.
7. Plaintiff sold a chattel to G. on condition that it should remain plaintiff's until paid for, and gave him a receipted bill of sale therefor, omitting, at G.'s request, any statement of the condition. Defendant bought the chattel of G. without notice of the condition, after having been informed by plaintiff that he had sold it to G., and after having seen the bill of sale, but before G. had paid plaintiff for it. *Held*, that in the absence of fraud, the plaintiff was not estopped to claim the chattel from the defendant. *Zuckermann v. Roberts* (Mass.), 663.
8. The good will of a physician's business is the subject of sale. *Hoyt v. Holly* (Conn.), 390.
9. A sale of stocks carries with it dividends already declared but to be subsequently paid. *Burroughs v. North Carolina R. R. Co.* (N. C.), 611.

See STATUTE OF FRAUDS, 55, 373; VENDOR AND VENDEE.

SATISFACTION.

After the service of a writ, but before the session of the court, defendant paid the debt, which plaintiff received in full of the debt; but no costs were paid, though demanded by the plaintiff. *Held*, that the plaintiff could not afterward proceed for nominal damages and costs. *Buell v. Flowers* (Conn.), 414.

SELF-DEFENSE.

A man's house is his castle only in the respect that it is sacred for the protection of his person and family. An assault on the house can be lawfully resisted to the extent of using deadly weapons, only in case the assault is made with the intent either of taking the life of the inmate, or of doing him great bodily harm, and such resistance is necessary to prevent such crime; or in case the inmate has reason to believe from the circumstances, and, in fact, does believe that it is necessary to prevent the commission of such crime. *State v. Patterson* (Vt.), 200, and note, 212.

SERVANT.

See MASTER AND SERVANT.

SLAVE CONTRACT.

See CONSTITUTIONAL LAW, 526.

STATUTE OF FRAUDS.

1. At an auction sale of hotel furniture and stable stock connected with the hotel at the same time and upon the same terms and conditions, part of which were cash on delivery had by plaintiff, defendant made separate purchases at various prices and under different bids; a number of which were under \$38, but all amounting in the aggregate to a sum exceeding \$38. The stable stock was taken away by defendant at the time of sale and afterward paid for by him. The remainder of the articles, which were carpets, were left in the hotel by consent of plaintiff and defendant, and were subsequently destroyed with the hotel by fire. In an action to recover the amount of defendant's bids, it was *held* that the contract of sale was an entirety and, therefore, within the statute of frauds, but that the delivery of the stable stock carried the transaction without the operation of the statute. *Jenness v. Wendell* (N. H.), 48.
2. An oral contract for sale and delivery of an article to be subsequently manufactured by the vendor is within the statute of frauds, unless the agreement calls for the peculiar skill, labor or care of the manufacturer, in which case it is for work and labor and not within the statute. *Prescott v. Locke* (N. H.), 55.
3. Plaintiff verbally agreed to purchase land of defendant, and paid money with a stipulation that defendant might retain it as a forfeiture if plaintiff failed to complete the contract. The defendant was willing and offered to convey, but plaintiff refused to perform. *Held*, that the whole agreement was one entire contract; that it was void by the statute of frauds; and that the plaintiff could recover the money paid as money had and received. *Scott v. Bush* (Mich.), 311.

4. Bill for the specific performance of a contract, of which the following was the only written evidence: "Received of (plaintiff) \$100 as part payment on a piece of property on the corner of," giving streets, city, county and State, and signed by the defendant. *Held*, not a sufficient memorandum within the statute of frauds. *Holmes v. Evans* (Miss.), 372.

See EASEMENTS, 582.

STOCKS.

See DIVIDENDS, 611.

SUNDAY.

- Plaintiff was injured on defendants' road while returning, on Sunday, from a Spiritualist camp meeting. *Held*, that it was for the jury to say whether the meeting was of a religious character, and whether the plaintiff attended it for the purpose of divine worship and religious instruction, so as to bring him within the exception of the act prohibiting traveling on Sunday. *Fettal v. Middlesex R. R. Co.* (Mass.), 720.

SURETYSHIP.

- The sureties to a bond are not holden if the instrument is not executed by the person whose name is stated as the principal therein. *Russell v. Annable* (Mass.), 665.

TAXES.

1. Notice of levy and sale of lands for taxes must be given to the mortgagee. *Whitehurst v. Gaskill* (N. C.), 655.
2. A sale of lands by an assignee in bankruptcy does not divest the lien of the State for taxes. *Stokes v. State* (Ga.), 588.

TELEGRAPH COMPANY.

- An act authorizing a telegraph company to erect its line on the land of a railroad company, without making due provision for enforcing the payment of damages, is unconstitutional. *South Western R. R. Co. v. South Western Telegraph Co.* (Ga.), 585.

TENANTS IN COMMON

1. The undivided interests of a tenant in common in distinct freeholds may be sold separately. *Butler v. Roys* (Mich.), 218.
2. Judgment was recovered against C, who was a tenant in common with others, of several distinct parcels of land in the same county. Execution was levied on a part of the parcels only, and they were sold separately to plaintiff. In ejectment by plaintiff, defendant claimed title under a subsequent voluntary partition between the tenants in common. *Held*, that the parcels of land being distinct freeholds, C's interest in each might be sold separately; that the plaintiff, not having been a party to the partition, was not affected thereby, and that therefore plaintiff was entitled to recover. *Id.*
3. Where A enters into an agreement with B to save from a wrecked vessel as much of the cargo as could be saved, and B agrees to allow him, for his

services, such a per cent of the property saved, as compensation; and in pursuance of such agreement, A recovers from the wreck a portion of the cargo and lands it on the beach in a place of safety; *held*, that A and B are tenants in common of the property so saved, and that the undivided share of A is liable to be seized by the sheriff under a warrant of attachment. *Boylston Ins. Co. v. Davis* (N. C.), 624.

THEATRES.

See CIVIL RIGHTS, 575.

TRADE-MARK.

1. Three brothers named Rogers had acquired a reputation in the manufacture of plated spoons and forks. Petitioners purchased from them the right to manufacture and sell plated spoons and forks stamped with the name "Rogers," and thereupon adopted and used as their trade-mark the words and figures: "1847, Rogers Bros., A 1." The said brothers were also employed by the petitioners in the manufacture of their goods. The goods so manufactured and stamped with the said trade-mark acquired a good reputation in the market. Subsequently three brothers of another family named Rogers, not previously engaged in the business, made an engagement with the respondent to manufacture for them, and also on his own account, plated spoons and forks. These were stamped "C. Rogers Bros., A 1." and "C. Rogers & Bros., A 1." It was found that these stamps resembled the petitioners' trade-mark to that degree that they were calculated to deceive, and did deceive "unwary purchasers;" that large quantities of respondent's goods had been sold by him upon the reputation of petitioners' goods, and that the respondent supposed that the resemblance of his stamp to the petitioners' would enable him more readily to sell his goods. *Held*, that the petitioners had a right to protection in the use of the stamp, "1847, Rogers Bros., A 1," as a trade-mark; and (2) that the respondent was violating that trade-mark by using a stamp so nearly resembling the petitioners', and that, therefore, respondent would be restrained from using his said stamp, and also from using the name "Rogers Bros." *Held*, also, that the use of the name "Rogers" would not be restrained. *Meriden Britannia Co. v. Parker* (Conn.), 401, and note, 410.
2. Under what circumstances one may be restrained from the use of his own name. See note, 410.

TRANSFER OF CAUSE.

See REMOVAL OF CAUSE.

TRESPASS.

In an action of trespass *quare clausum* and for assault, defendant pleaded that the *locus* was part of plaintiff's house, which had been used by him while postmaster as a post-office; that one G. having succeeded him in that office, had license for him to enter and remove the public property of the United States; that defendant, as assistant-postmaster and servant to G., and by his direction, attempted to enter for that purpose, but was resisted and assaulted by plaintiff, whereupon, etc. (justifying the trespass). *Held*

that the justification was good, and would have been so without a revocation of license. *Sterling v. Warden* (N. H.), 80.

TRIAL.

After a jury had retired to consider of their verdict, the court sent to them, in answer to their request, an instruction in writing, and, also, a copy of the statute, without the knowledge of counsel on either side. *Held*, error. *State v. Patterson* (Vt.), 200.

TRUST

1. Where the property of a corporation consists wholly of real estate, and a part of it is taken by eminent domain, the compensation therefor, if distributed as a dividend to the shareholders, belongs to the capital and not to the income of a trust fund invested in the shares. *Heard v. Eldredge* (Mass.), 687.
2. A by deed conveyed all her property, "both real and personal," to a trustee in trust, to pay the income to her during her life, and at her death to transfer the property as she should by will appoint, and in default of such will to convey the property to her "heirs at law." The trust property was all personal. A died intestate. *Held*, that the trust property being personalty, the word "heirs" meant the persons entitled to take under the statute of distributions, and that therefore the property went to A's husband, and not to her child. *Sweet v. Dutton* (Mass.), 744.

VENDOR AND VENDEE.

1. Parties had a contract for the purchase and sale of real estate; defendant refused to complete the contract by accepting deed and paying the purchase price. *Held*, (1) that the measure of damage to the vendor was the difference between the contract price and the value of the real estate when the vendee refused to complete; (2) that, after the vendee had refused to complete, the vendor was not obliged to consult him or obtain his consent to a sale of the real estate to another party. *Griswold v. Sabin* (N. H.), 76.
2. Goods were bought by means of fraud under such circumstances as entitle the vendor to treat the whole transaction as void, and the vendee, upon getting possession, immediately transferred them, by general assignment of all his property, to an assignee. *Held*, that the vendor could maintain replevin against the assignee. *Farley v. Lincoln* (N. H.), 182.

See FRAUDS, 608; STATUTE OF FRAUDS, 811.

WAR.

An executor during the war received money bequeathed to legatees residing in Indiana, which was afterward confiscated by the Confederate government. *Held*, that the Confederate government had authority as an exercise of belligerent rights to confiscate the property as of an alien enemy and that act released the executor from his responsibility therefor. *Newton v. Bushong* (Va.), 558.

WATER AND WATER-COURSES.

See EASEMENTS, 582.

WITNESS

Where the sale of liquor is made a criminal offense by the statute, the purchaser of the same is not guilty of a criminal act, and hence is not excused from testifying as to the purchase on the ground that it would tend to criminate him. *State v. Rand* (N. H.), 127.

WORDS.

"*Conviction*," see PARDON, 699.

"*Created by Fraud*," see BANKRUPTCY, 191.

"*Heirs*," see TRUST, 744.

"*Taking of Private Property*," see CONSTITUTIONAL LAW, 147.

7



.

1.6



3 6105 063 240 928

